Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITIZENS UNITED,
Petitioner,

v.

UNITED STATES OF AMERICA,
WILLIAM JEFFERSON CLINTON,
JAMES MCDOUGAL, JIM GUY TUCKER,
SUSAN MCDOUGAL,
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, ET AL.,
AND DOW JONES COMPANY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. Whether the lower courts' decisions violated the public's common law right of access to judicial records by refusing to grant members of the public access to a videotaped deposition containing the witness testimony of the President of the United States in a criminal trial, which was taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure, played to the jury in open court, and remains in the custody of the federal trial court?

2. Whether the lower courts' decisions violated the Petitioner's First Amendment rights by basing their refusal to allow Petitioner access to a videotaped deposition constituting a judicial record on the ground that the judicial record might be used to undermine the political popularity of the deponent, the President of the United States?

3. Whether the First Amendment entitles members of the public to receive post-trial access to videotaped deposition testimony, where the public had been barred from attending the court session and the witness' testimony was videotaped for use as a substitute for live testimony at trial?

4. Whether a nonprofit citizens advocacy group, that seeks, for its own use, a copy of the videotaped deposition of the President of the United States as a witness in a criminal trial, has standing to petition the courts for a copy of the videotape?

PARTIES BELOW

The Petitioner, Citizens United, was an Interested Party/Appellant in the court of appeals. Citizens United is a citizens advocacy group organized as a nonprofit social welfare organization, incorporated under the laws of the Commonwealth of Virginia; it does not have any parent companies or subsidiaries.

Respondent, United States of America, was the Plaintiff/Appellee in the court of appeals.

Respondent, William Jefferson Clinton, President of the United States, was an Interested Party/Appellee in the court of appeals.

Respondents, Reporters Committee for Freedom the Press, Radio-Television News Directors Association, Capitol Cities/American Broadcasting Companies, Cable News Network, Inc., National Broadcasting Company, Inc. and CBS, Inc., were Movants/Appellants in the court of appeals in a related, but separate, case that was heard and decided together with Citizens United's appeal.

Respondents, James B. McDougal, Jim Guy Tucker and Susan McDougal, were Defendants/Appellees in the court of appeals. None of these individuals participated actively in the proceedings before the court of appeals.

Respondent, Dow Jones Company, Inc., was a Movant/Appellee in the district court. It did not participate actively in the proceedings before the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Citizens United respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (App. 1a-19a) are officially reported at 103 F.3d 651 (8th Cir. 1996). The opinion and

judgment of the United States District Court for the Eastern District of Arkansas (App. 24a-34a) are officially reported at 940 F.Supp. 224 (E.D. Ark. 1996).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The opinion and judgment of the court of appeals (App. 1a-19a) were entered on December 20, 1996, and a timely petition for rehearing was denied by order dated February 10, 1997 (App. 35a). This petition is timely filed within 90 days after the denial of the petition for rehearing.

CONSTITUTIONAL AND COMMON LAW PROVISIONS AT ISSUE

The following Constitutional and regulatory provisions are at issue in this case:

The First Amendment to the United States Constitution, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The public's common law right of access to judicial proceedings and records, which was defined by this Court in *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), as follows:

[A] general right to inspect and copy public records and documents, including judicial records and documents.

STATEMENT OF THE CASE

I. PRESIDENT CLINTON'S VIDEOTAPED DEPOSITION.

Defendants James B. McDougal, Susan McDougal and Jim Guy Tucker were indicted, tried and convicted of criminal wrongdoing in connection with various financial transactions involving Madison Guaranty Savings & Loan Association and Capital Management Services, Inc., a business investment company licensed by the Small Business Administration. The trial was related to the Whitewater inquiry that is currently being investigated by Independent Counsel Kenneth Starr. The President and Mrs. Clinton are former business partners of the McDougals in the Whitewater Development Company.

During the course of the trial, defendants James McDougal and Susan McDougal subpoenaed President Clinton as a fact witness in their behalf. (App. 25a, 38a.) On March 20, 1996, the trial court denied the McDougals' motion to compel the personal appearance of the President, granting instead the President's request that his testimony be taken by court-supervised videotaped deposition pursuant to Rule 15 of the Federal Rules of Criminal Procedure. (App. 38a-42a.)

On April 2, 1996, the trial court entered an order, which, *inter alia*, prohibited the public from attending the videotaping of President Clinton's testimony. (App. 43a.)

On April 24, 1996, the trial court ordered that the videotaped testimony of President Clinton be sealed and that

the parties submit briefs within thirty days regarding the handling and release of the videotape after it was presented to the jury. (App. 44a.) The court also "invited any representatives of the news media to file an amicus curiae brief with the Court on or before May 24, 1996." (App. 26a.)

President Clinton's deposition was taken on April 28, 1996, at the White House, with the trial court presiding via a two-way satellite hookup. (*Id.*)

On May 9, 1996, an edited version of the President's videotaped testimony was presented to the jury in open court. (App. 27a.) Thereafter, the trial court ordered the release of the transcript of that portion of Mr. Clinton's testimony that was presented to the jury. The actual videotape containing the President's testimony, however, was not released and remains in the custody of the court, under seal. (*See* App. 44a.)

II. PROCEEDINGS BEFORE AND DECISION OF THE DISTRICT COURT

On May 3, 1996, the Reporters Committee for Freedom of the Press and several news media organizations (hereinafter referred to collectively as "Reporters Committee") filed an application with the trial court seeking immediate access to a copy of the videotape containing the President's deposition testimony. The court denied the motion for immediate access, but delayed a final decision on whether to release the videotape until after it had been presented to the jury. The news media organizations appealed this interim decision to the Eighth Circuit Court of Appeals, which, on May 17, 1996, dismissed the appeal for lack of jurisdiction. (App. 27a fn. 4.)

On May 13, 1996, Citizens United, the Petitioner herein, filed an application with the trial court seeking a copy of the unedited version of President Clinton's videotaped testimony for its own use.[1] (App. 45a-48a.) Citizens United requested that the tape be released once the jury rendered its verdict.

On or about May 24, 1996, Dow Jones & Company, Inc., which publishes the *Wall Street Journal*, filed a petition to intervene, together with an application for access to the "unedited videotape" and the transcript of Mr. Clinton's deposition. (App. 28a.)

On June 11, 1996, the trial court entered an order denying the applications of Citizens United, the Reporters Committee and Dow Jones, insofar as each applicant sought a copy of the videotape. The court granted Dow Jones' request for a copy of the full transcript of Mr. Clinton's deposition. (App. 24a-34a.)

The court further held, *sua sponte*, that Citizens United did not have standing to petition the court for access to the videotape because "Citizen United [sic] is not a party to this

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[1] The trial court had jurisdiction over Citizens United's application pursuant to 28 U.S.C. § 1331. *See National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 850 (1985) (district courts have jurisdiction under 28 U.S.C. § 1331 over claims based on federal common law; it is not necessary to have a claim based on a federal statute or provision of the Constitution). *See also Nixon* v. *Warner Communications Inc.*, 435 U.S. 589, 597-98 (1978) (recognizing that members of the public have a common law right to petition the courts for a writ compelling access to public records).

action and is not a news media organization." (App. 26a fn. 2.)

In addressing the merits of the various applications, the trial court assumed that the videotape was a "judicial record," (App. 30a), but held that neither the First Amendment nor the public's common law right of access to judicial records justified release of the videotape. (App. 30a-31a.)

In its decision, the trial court recognized that the public and press have a "strong interest...in access to judicial proceedings and in obtaining important information." (App. 31a.) The trial court also found that there was little likelihood that release of the videotape would be prejudicial to the fair trial rights of any of the defendants, including Jim Guy Tucker, who faces trial on a second indictment. (App. 33a fn. 10.)

Despite this strong foundation for releasing the videotape, the court refused to do so on four interrelated grounds.

First, the court found that the media and public had already been accorded "substantial access" to the trial because, "the press has attended the trial, reported the events of the trial to the public, and had a transcript of the videotaped deposition available to it." (App. 31a.)

Second, the court said that it would be inappropriate to treat the videotaped testimony of the President "differently from that of any other witness." (App. 31a-32a.) On this point, the court said that Rule 53 of the Federal Rules of Criminal Procedure would have prohibited photographing or broadcasting the President's testimony had he testified live at trial, and that allowing public access to President Clinton's

videotape would "contravene the Court's concern with accommodating the interests of the Presidency and might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties." (App. 32a.)

Third, the court said that the case before it involved "unique circumstances" and that other courts faced with the issue of public access to Presidential testimony have refused to release the videotaped testimony. (*Id.*)

Fourth, and most significantly, the court concluded there was "potential for misuse of the tape," by persons other than the news media. (*Id.*) This conclusion was based on the arguments by the Government[2] that concern over possible "commercial and political exploitation" by the President's political opponents "strongly militates against" releasing the videotape.[3] (App. 51a.)

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[2] Although the United States was a party to the underlying criminal cases, the U.S. Department of Justice claimed to represent the President in his official capacity. (App. 49a-51a and 55a-61a.)

[3] A May 24, 1996 "Memorandum of the President in his Personal Capacity in Support of Motion for Protective Order" argued that the district court should withhold the tape, *inter alia*, for political reasons, as follows:

> [I]f applicants and others are permitted to copy and disseminate the videotape, the President's testimony will inevitably be distorted and used for improper purposes.

(continued...)

III. PROCEEDINGS BEFORE AND DECISION OF THE COURT OF APPEALS

Citizens United filed a timely notice of appeal of the district court's decision denying it access to the President's videotaped deposition,[4] and its appeal (Case No. 96-2671) was consolidated with the appeal of the Reporters Committee (Case. No. 96-2606) for purposes of oral argument. Dow Jones did not appeal the decision of the trial court, nor did any of the defendants in the underlying criminal trial.

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[3](...continued)

> The President's political opponents have already declared their intention to use portions of this videotape (necessarily taken out of context) in political "attack ads." If the tape were released, there would of course be no "safeguard, other than the taste of the marketing medium against distortion through cutting, erasing, and splicing of tapes." Moreover, if this tape is released to the public, there is a strong likelihood that it (or portions of it) will be used in the marketplace for the [sic] commercial gain, whether by the applicants or others.
>
> * * * *
>
> In sum, if the President's videotaped testimony is released for copying, it will be distorted for partisan purposes and exploited for commercial gain.

(App. 53a (footnotes and internal citations omitted).)

[4] The court of appeals had jurisdiction over Citizens United's appeal pursuant to 28 U.S.C. § 1291. *See In Re Search Warrant for Secretarial Area-Gunn*, 855 F.2d 569, 571-72 (8th Cir. 1988) (a district court's order denying a member of the public access to a judicial record is a final appealable order under 28 U.S.C. § 1291).

The court of appeals granted the Reporters Committee's motion for expedited consideration of the appeal and directed Citizens United to address the issue of standing in its brief. The court also authorized Citizens United to address the merits of the trial court's decision if it desired to do so. (App. 36a-37a.) Citizens United addressed both the standing issue and the merits of the case in its brief and at oral argument.

On appeal, President Clinton and the Government reiterated their contentions that it was appropriate for the trial court to weigh the impact that release of the tape might have on President Clinton politically. Indeed, the Justice Department noted that "Citizens United itself appended to its district court brief the contents of a newspaper article quoting its chairman, Floyd G. Brown, as stating that the videotape is 'legitimate for campaign use.'" (App. 60a.)

President Clinton, in his personal capacity, argued that "[t]he district court was properly concerned with the danger of misuse of the tape.... [P]rior to the district court's decision there had been considerable publicity about the likelihood that portions of the videotape might be used in partisan 'attack ads.'" (App. 63a-64a.)

Following oral argument, the court of appeals affirmed the district court's denial of access.[5] The court held that: (1) as a matter of law, the videotape of the President's testimony "is

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[5] Prior to the issuance of its final opinion and judgment on December 20, 1996, the court of appeals issued a one-paragraph order, stating "for reasons that will be stated in an opinion to follow, we affirm the district court's denial of access to the videotape." (App. 20a-23a, *United States* v. *McDougal*, 92 F.3d 701 (8th Cir. 1996).)

not a judicial record to which the common law right of public access attaches" (App. 12a), and (2) the public does not have a First Amendment right to the videotape itself, because the public had access to the information contained in the videotape. (App. 18a.)

In holding that the videotaped deposition of President Clinton's testimony is not a judicial record, the Eighth Circuit (App. 13a-15a) rejected the holding of the Second Circuit that a videotaped deposition, which is taken and used as a substitute for live trial testimony in a criminal trial, is a judicial record. *See Application of CBS*, 828 F.2d 958 (2d Cir. 1987) (absent extraordinary circumstances, the public has a common law right to inspect and copy the videotape of depositions used at trial where the witness is unable to provide live testimony).

The Eighth Circuit further opined that even if the videotape were a judicial record, the trial court did not abuse its discretion in denying access to it, because the Eighth Circuit takes a deferential view toward a trial court's "consideration of competing values" in determining what records to make available to the public. (App. 14a-15a.)

In evaluating the factors weighed by the trial court, the Eighth Circuit acknowledged that there is a "presumption in favor of public access to judicial records"[6] (App. 14a), but it embraced each of the four factors articulated by the trial court,

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[6] Most circuits addressing this issue found a strong presumption in favor of access. *See infra*, pp. 17-19. The Fifth and Eighth Circuits view the presumption in favor of access as more easily overcome.

including the trial court's conclusion that there was a potential for "misuse" of the tape. (App. 15a-16a.)

In addition to the four factors considered by the trial court, the Eighth Circuit added three more considerations, which it said further supported the district court's decision not to release the videotape. Those reasons were: (1) concern over commercial or private use of the videotape; (2) the need to "preserv[e] the availability of material testimony in a criminal case"; and (3) "a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting President." (App. 16a-17a.)

Finally, having disposed of the case on the merits, the court of appeals declined to address the issue of whether Citizens United has standing to petition the courts for access to the videotape. (App. 19a.)

Citizens United filed a timely petition for rehearing with a suggestion for rehearing *en banc*. On February 10, 1997, the court of appeals denied both the petition for rehearing and suggestion for rehearing *en banc*. Two members of the court, voted, however, to grant Citizens United's suggestion for rehearing *en banc*, and three members of the court, without explanation, recused themselves from consideration of the petition. (App. 35a.)

REASONS FOR GRANTING THE WRIT

This case presents an issue of profound Constitutional importance, involving the denial of fundamental First Amendment rights, and presenting issues of law on which there is a division of authority among the federal circuit courts

of appeal. The central Constitutional issue is whether the public can be forever denied access to a videotaped deposition containing criminal trial testimony of the President of the United States, where a principal reason for denying access is the Government's claim that the videotape might be used by the President's political opponents to undermine his popularity. This Court also should grant the writ to resolve the conflict among the circuits as to whether a videotaped deposition, used in a criminal trial as a substitute for live witness testimony, is a judicial record, and whether the trial court may Constitutionally deny public access to that record in the absence of legitimate and compelling reasons (such as danger to national security).

I. THE DECISIONS BELOW UNDERMINE IMPORTANT FIRST AMENDMENT PRINCIPLES PROTECTING SPEECH AND POLITICAL DEBATE

Nearly twenty years ago, in *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court was confronted with some of the same issues raised in this petition for writ of certiorari. In *Nixon*, this Court faced the task of determining the factors to be considered (and the weight due each factor) in deciding whether certain audio recordings used in court proceedings should be immediately released to the public. These audio recordings had been made by President Nixon and admitted into evidence in the Watergate trials of several of his top aides. The issue was not resolved, however, because of the Congressional enactment of the Presidential Recordings Act, providing an administrative procedure for processing and releasing the tapes to the public. *Nixon*, *supra*, 435 U.S. at 602-06.

This petition for a writ of certiorari presents the Court with the question left unanswered in *Nixon*. Here, no administrative process exists to provide access to the videotape of President Clinton's testimony. Unless the decision of the court of appeals is reversed, the public will be forever barred from gaining access to the videotape, because the tape has been ordered held under seal in perpetuity.

The decision to deny the public access to the videotape, and the legal basis for that decision, are of profound Constitutional importance. The decisions of the trial court and court of appeals, if allowed to stand, will work to undermine the bedrock First Amendment principle that government may not proscribe or interfere with peaceful political speech (here, by preventing access to a judicial record generated by a court while in session) simply because government officials believe that they would disagree with the political message Citizens United seeks to convey.

A principal reason cited by both the trial court and court of appeals for denying public access to the videotape was the contention by the Government and President Clinton that Citizens United would use the videotape to undermine President Clinton's popularity during the 1996 Presidential campaign.[7]

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[7] Even if this had been a legitimate basis for denying access to the videotape in early 1996 (and Petitioner contends that it was not), it no longer provides any justification for refusing to grant access, because President Clinton has been re-elected to a second term as President and is Constitutionally barred from seeking or holding any subsequent terms in that office. See U.S. Const. Amend. XXII § 1.

Reliance on this factor is wholly at odds with this Court's recognition that "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos* v. *Barry*, 485 U.S. 312, 318 (1988) (citations omitted). As this Court stated in *Hustler Magazine* v. *Falwell*, "one of the prerogatives of American citizenship is the right to criticize public men and measures.... The candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary," 485 U.S. 46, 51 (1988) (internal quotation marks and citations omitted).

If allowed to stand, the trial court and appellate court decisions, denying public access to President Clinton's videotaped testimony, will effectively undercut this Court's established and profound commitment to uninhibited, robust, and wide-open debate on important political and public policy matters.

II. THE DECISIONS BELOW ERRONEOUSLY DENY THE PUBLIC ACCESS TO A JUDICIAL RECORD — A QUESTION ON WHICH THE FEDERAL CIRCUITS ARE IN CONFLICT

A. THE EIGHTH CIRCUIT ERRONEOUSLY HELD THAT A VIDEOTAPED DEPOSITION IS NOT A JUDICIAL RECORD

Prior to the Eighth Circuit's decision in this case, no federal appellate court had held that a videotaped deposition taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure and used as a substitute for live testimony in a

criminal trial is not a judicial record. In fact, the contrary has been held. The Second Circuit specifically recognized such videotapes as judicial records, and concluded that Rule 53 of the Federal Rules of Criminal Procedure in no way countermands this determination. *See Application of CBS, Inc.*, 828 F.2d 958 (2d Cir. 1987). In explaining its holding, the Second Circuit stated:

> The analogy between a videotaped deposition introduced in evidence and live testimony does not withstand scrutiny. Whatever disruptive effects the physical presence of cameras and recording equipment may be thought to have on trials, the copying and rebroadcast of a videotaped exhibit can have no such effect. The need for judicial oversight of cameramen or other technicians is minimal; there is no danger of the jury being exposed to inadmissible evidence or argument; and depositions are taken in private.

Id. at 959.

Likewise, in *In Re National Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981), the D.C. Circuit stated that "although the [common law] right [to inspect and copy judicial records] was first recognized at a time when records were documentary in nature, it is now settled that the right extends to records which are not in written form, such as audio and video tapes." *Id.* at 612.

The Third and Seventh Circuits have also taken a similarly reasoned view of what constitutes a judicial record. *See Smith* v. *United States District Court*, 956 F.2d 647, 650 (7th Cir. 1992); *United States* v. *Martin*, 746 F.2d 964, 968 (3rd Cir.

1984). Indeed, the Seventh Circuit has stated that such records encompass "everything in the record, including items not admitted in evidence." *Smith*, 956 F.2d at 650. *See also United States* v. *Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985) (the right of access includes the right of the media to copy audio or video tapes which have been admitted into evidence in a criminal trial).

Thus, the Eighth Circuit's decision is at variance with the views of each of the federal courts of appeal that has addressed the issue of what constitutes a judicial record.

B. THE EIGHTH CIRCUIT INCORRECTLY DETERMINED THAT THERE IS ONLY A WEAK PRESUMPTION FAVORING PUBLIC ACCESS TO JUDICIAL RECORDS

In contrast to the opinion of the Eighth Circuit, the Second, Third, Seventh and District of Columbia Circuits have each held that there is a "strong presumption" favoring access to judicial records. *United States* v. *Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985); *In Re National Broadcasting Co., Inc.*, 653 F.2d 609, 613 (D.C. Cir. 1981); *United States* v. *Criden*, 648 F.2d 814, 823 (3rd Cir. 1981); *Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980).

The Second Circuit has stated that "the presumption in favor of the public right to inspect and copy judicial records [is] so strong that only the 'most extraordinary circumstances' or the 'most compelling circumstances' would justify restricting that right '[w]hen physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering

with the orderly conduct of trial.'" *Application of CBS*, 828 F.2d 958, 960 (2d Cir. 1987) (quoting *Application of National Broadcasting Company*, 635 F.2d 945, 952 (2d Cir. 1980)).

Other federal circuits share this view, and several federal appellate decisions have recognized that the presumption favoring access is particularly strong when the materials sought relate to the activities of public officials. *E.g., United States* v. *Martin*, 746 F.2d 964, 968-69 (3rd Cir. 1984); *In Re National Broadcasting Co.*, 653 F.2d 609, 613-14 (D.C. Cir. 1981); *United States* v. *Criden*, 648 F.2d 81, 823 (3rd Cir. 1981); *Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980).

While the Eighth Circuit pays lip service to a presumption in favor of releasing judicial records, it treats the presumption as quite weak and easily overcome. It stands alone in allowing the trial court virtually unfettered discretion to determine what factors to consider and the weight to be accorded each.[8]

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[8] The Eight Circuit purports to follow the standard adopted by the Fifth Circuit in *Belo Broadcasting Corp.*, v. *Clark*, 654 F.2d 423 (5th Cir. 1981), which held that an order denying access is subject to appellate review on an abuse of discretion standard, as opposed to *de novo* review (App. 14a). But the justification cited by the trial court in *Belo Broadcasting* (and affirmed by the Fifth Circuit) for denying the news media immediate access to audio recordings that had been admitted into evidence at trial was concern for the fair trial rights of an individual who had yet to be tried. *See id.* at 431. Here, in contrast, the justifications for denying access have nothing to do with defendants' rights to a fair trial; rather, a principal justification is the

(continued...)

But, as the pending case demonstrates, the purported presumption accorded public access by the Eighth Circuit is virtually meaningless. For example, the appellate court here suggests that the trial court could have denied access based on mere speculation that the records might be used for commercial purposes (App. 16a-17a). If the mere possibility of future commercial use provides a legitimate basis for denying access, every record pertaining to every court proceeding in the nation would be subject to permanent seal, since there is no guarantee that any given court record would never be used for any commercial purpose.

The same defect in the Eighth Circuit's rationale exists with respect to the "private pursuit" theory on which it relied (App. 16a-17a). Hypothesis and conjecture such as that employed by the Eighth Circuit could never overcome a true legal presumption. Thus, the presumption in favor of public access that the Eighth Circuit pretended to observe was so weak in reality that it did not actually constitute a presumption at all.

C. The Eighth Circuit Improperly Considered Potential "Political Use" of the Videotape in Denying Public Access

Even where a court may properly exercise its discretion to withhold access to a judicial record, the motivation for its

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[8](...continued)
Government's purported interest in avoiding criticism of an incumbent President.

action must be a permissible one. Where courts have denied the public access to taped materials, whether the tapes be audio or video, denial has been consistently based on considerations such as: (A) prejudice to the defendant's fair trial rights, *e.g.*, *United States* v. *Webbe*, 791 F.2d 103 (8th Cir. 1986) (affirming the trial court's conclusion that the defendant's Sixth Amendment right to a fair trial outweighs the media's common-law right of access to audio tapes admitted into evidence in a criminal trial); (B) harm to innocent third parties, *e.g.*, *Application of KSTP Television*, 504 F.Supp. 360 (D. Minn. 1980) (application of a television station for a copy of videotapes made by a convicted kidnapper, which recorded the defendant's "repeated sexual rapes" of one of his victims, denied on grounds that the innocent victim's right to privacy outweighs media's right of access); or (C) concerns over the release of sensitive national security information, *e.g.*, *In Re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (recognizing national security concerns as a legitimate factor to consider in determining whether to release the transcript of a plea hearing in connection with espionage charges); *United States* v. *Poindexter*, 732 F.Supp. 165 (D.D.C. 1990) (media denied immediate access to unedited copy of videotaped deposition of former President Ronald Reagan in trial of former national security advisor because classified information was likely to be disclosed during the testimony). None of these factors are present in the pending case.[9]

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[9] The trial court concluded early on that President Clinton's testimony would not implicate national security secrets because it "concerns events prior to his presidency." (App. 41a.) In addition, the

(continued...)

The overriding reason for denying access to the videotape in this case was speculation that the President's political opponents would "misuse" the videotape, by using it to make political commercials or otherwise employing it to oppose President Clinton's re-election effort. (App. 16a, 32a-33a.)

Petitioner is aware of no other case in which a federal appeals court has upheld the denial of access to a judicial record where the denial was predicated upon concern over the possible use of the record in political speech.

To the contrary, the D.C. Circuit has expressly rejected consideration of such a concern as a basis for nondisclosure. Indeed, the D.C. Circuit rejected former Congressman John Jenrette's contention that news media access to audio tapes

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[9](...continued)
court made no finding (nor has any party suggested) that releasing the deposition of the President's testimony would in any way harm or invade the privacy rights of innocent third persons. Finally, the trial court expressly rejected the contention that releasing the videotape would prejudice the right of any of the defendants, stating:

> The Court has also considered defendants' argument that release of the videotape would deny them a fair trial. Defendant Tucker is facing a second indictment which has not yet gone to trial. The Court, however, is of the opinion that release of the videotape would have little impact on Tucker's second trial and that this factor does not weigh heavily in favor of not releasing the videotape.

(App. 33a fn. 10.) Neither Mr. Tucker nor the McDougals challenged this finding before the court of appeals.

used by the prosecution in his trial on charges stemming from the ABSCAM scandal should be denied because his political opponents would use the tapes against him. *In Re National Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981). In reversing the trial court's refusal to release the tapes, the D.C. Circuit explained that:

> under these circumstances, Jenrette's concern for his reputation and any embarrassment which may flow from the additional disclosure of the tapes is entitled to little weight, for the embarrassment anticipated is largely that which results whenever misconduct or questionable conduct is exposed.

Id. at 619 (internal quotation marks omitted).

The Eighth Circuit's opinion in the pending case also conflicts with the Seventh Circuit's decision in *United States* v. *Guzzino*, 766 F.2d 302 (7th Cir. 1985), where the court held that factors including whether the news media would accurately report the contents of the tapes, or whether the public would understand the tapes, should play no role in the trial court's determination of whether to release taped materials. According to the Seventh Circuit, the trial court's "sole concern" should be "with the constitutional rights of the defendants," and if the judge determines that the defendants will suffer no prejudice from release of the tape, the tape must be released. *Id.* at 304.[10]

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[10] In *Guzzino, supra*, there was no contention that release of the tapes would violate the privacy rights of innocent third parties or

(continued...)

III. THE EIGHTH CIRCUIT'S RULINGS WOULD UNDERMINE THE PUBLIC'S FIRST AMENDMENT RIGHT TO ATTEND JUDICIAL PROCEEDINGS

The pending matter also presents the Court with an opportunity to resolve confusion over whether the public has a First Amendment right of access to videotaped testimony, where the public was denied access to the federal court proceeding in which the testimony was taped.

This Court has long recognized that members of the public have a First Amendment right to be present during a criminal trial. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). This right extends beyond the mere presentation of evidence to the jury. *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984). The only exceptions occur where the Government has demonstrated "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510.

Moreover, the public's right to attend such proceedings is not satisfied by merely making a transcript of the proceedings available after the fact. As Justice Brennan pointed out in his concurring opinion in *Richmond Newspapers*, *supra*, "the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction

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[10](...continued)
harm national security.

of events that transpire in the courtroom." 448 U.S. at 597 n. 22.

In the pending case, however, the Eighth Circuit took the opposite view and held that the public has no First Amendment right of access to the videotape of the President's testimony, because the videotape is not a judicial record and the public had access to the trial itself. Neither the trial court, nor the court of appeals, addressed Petitioner's contention that access is required to vindicate the public's First Amendment right to have attended the actual taping of President Clinton's testimony, which was presided over by the trial court.

As recognized by the U.S. District Court for the District of Columbia (but implicitly rejected by the Eighth Circuit in the pending case), the public's First Amendment right to attend judicial proceedings extends to the videotaping of a witness' testimony, certainly where the trial court presides over the taping. *See United States* v. *Poindexter* ("Poindexter I"), 732 F.Supp. 165, 167 (D.D.C. 1990).

In Poindexter I, however, the trial court prohibited the public from attending the taping of former President Ronald Reagan's testimony because it involved matters of national security. 732 F.Supp at 166. To vindicate the public's right of access, the court ordered "the release of the tape to the public and the press as soon as the editing [of the tape] has been completed." *Id.* at 170. Later, to avoid prejudicing the defendant's right to a fair trial, the court expressed its intent to delay actual release of the videotape for copying until after it was played to the jury at trial. *United States* v. *Poindexter* ("Poindexter II"), 732 F.Supp. 170, 172 n.2 (D.D.C. 1990).

This Court should adopt a similar policy with respect to President Clinton's testimony. Here, the grounds for refusing to allow the public to attend the taping of President Clinton's testimony are far weaker than they were with respect to former President Reagan's testimony. In the pending case, the trial court recognized that there was no danger whatsoever that national security secrets would be compromised by allowing the public to attend the taping. (App. 41a). Nor was concern for the President's safety a valid basis for keeping the public at bay. The trial court presided over the taping via a two-way satellite hook-up between the White House and the courthouse in Little Rock, Arkansas. There is no valid safety reason why the public could not have been allowed to observe the proceedings in the courtroom in Little Rock to view the President's testimony as it was being taped. Finally, even if potential prejudice to the defendants' fair trial rights presented a compelling reason for denying the public access to the testimony at the time of the videotaping, the trial court has concluded that no such justification currently exists for denying the public access to President Clinton's videotaped testimony.

As explained above, the primary reason the videotape remains under permanent seal is to keep it out of the hands of the President's political opponents. The government cannot credibly contend that keeping the tape under permanent seal is a narrowly tailored solution aimed at furthering a legitimate and compelling government interest.

IV. THE LOWER COURTS INCORRECTLY DENIED THE PUBLIC STANDING TO SUE FOR ACCESS TO JUDICIAL RECORDS

Although sidestepped by the court of appeals, the trial court's holding that Citizens United lacks standing to petition the court for access to the videotape bearing President Clinton's criminal trial testimony is clearly wrong and ought not be allowed to stand.[11]

As stated by this Court in *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 610 (1978), individual members of the public are on an equal footing with the press in seeking access to court proceedings and records. This proposition is so well engraved in our nation's jurisprudence that none of the parties to this action filed briefs opposing Citizens United's contention that it has standing to sue. Indeed, even the Department of Justice, which vigorously defended the trial court's decision on the merits, acknowledged in its brief before the court of appeals that the trial court's holding on the issue of standing was wrong. (App. 59a fn. 8.)

This Court should grant the writ on the question of standing as well in the interest of judicial economy and to provide Citizens United with complete relief in the event the Court reverses the court of appeals on the merits of the case.

CONCLUSION

The primary issue presented in this case is the public's right to judicial records, which always have been and must continue

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[11] Citizens United has included this issue in its petition for writ of certiorari to fully preserve its appellate rights with respect to this issue. *See also* Rule 24.1(a), Rules of the United States Supreme Court.

to be public information — especially when they concern the nation's highest elected official. The Government of the United States, President Clinton, the trial court and the Eighth Circuit Court of Appeals each has stated that the President's desire to win re-election and be protected from criticism before the American public outweighs the public's right to see and hear his testimony in a criminal trial involving his former business partners and immediate successor as Governor of Arkansas, despite the long-standing principle favoring robust public debate on political matters.

Until the Eighth Circuit's ruling in the pending matter, every federal appellate court that had considered the issue of public access to judicial records, where the conduct of a high ranking government official is at issue, concluded that: (1) adverse political publicity resulting from the release of such records is not a valid basis for denying access; and (2) absent a compelling reason to the contrary, such records should be released so that the public can see, hear and evaluate first-hand the actions of such officials.

In contrast, the Eighth Circuit has slammed the courthouse door in the public's face by affirming the trial court's decision to permanently seal the videotape bearing the President's testimony from public purview.

This Court should not allow this case to stand as a precedent against the public's right to access. It should grant the petition for writ of certiorari in order to resolve the split of authority in the federal circuits over this profoundly important Constitutional issue, because the right of the American people to see, hear and evaluate the testimony of the President of the United States should not depend on the particular judicial

circuit in which the underlying trial takes place. The rule regarding access to such testimony should be uniform throughout the nation, and it should afford the public broad access to such records.

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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United States of America, Plaintiff, v. James B. McDougal; Jim Guy Tucker; Susan H. McDougal; Defendants. Reporters Committee for Freedom of the Press; Radio-Television News Directors Association; Capitol Cities/American Broadcasting Companies; Cable News Network, Inc.; National Broadcasting Company, Inc.; CBS, Inc.; Movants-Appellants, v. Dow Jones and Company, Inc.; Movant, William Jefferson Clinton, The President of the United States in his official capacity, Interested Party-Appellee. United States of America, Plaintiff, v. James B. McDougal; Jim Guy Tucker; Susan H. McDougal; Defendants. Reporters Committee for Freedom of the Press; Radio-Television News Directors Association; Capitol Cities/American Broadcasting Companies; Cable News Network, Inc.; National Broadcasting Company, Inc.; CBS, Inc.; Movants, v. Dow Jones and Company, Inc.; Movant, William Jefferson Clinton, The President of the United States in his official capacity, Interested Party-Appellee. Citizens United, Interested Party-Appellant.

No. 96-2606, No. 96-2671

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

103 F.3d 651; 1996 U.S. App. LEXIS 33188;
25 Media L. Rep. 1097

August 12, 1996, Submitted
December 20, 1996, Filed

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Eastern District of Arkansas. 95-CR-173. Honorable George Howard, District Judge.

DISPOSITION: Affirmed.

COUNSEL: Counsel who presented argument on behalf of the appellant was Philip Anderson, Little Rock, AR for CBS, NBC, CNN, Capitol Cities, Radio & TV, Reporters Committee. Additional attorneys appearing on the brief were Leon Holmes and Jeanne L. Seewald. Donald C. Donner, Fayetteville, AR for Citizens United. Additional attorney appearing on the brief was Michael R. Shahan.

Counsel who presented argument on behalf of the appellee was Gregory T. Jones, Little Rock, AR and Douglas Letter, Washington, DC. Additional attorney appearing on the brief were John R. Tisdale and Troy A. Price.

JUDGES: Before McMILLIAN, FLOYD R. GIBSON and MAGILL, Circuit Judges.

OPINION: [*652] McMILLIAN, Circuit Judge.

A group of media organizations, including Reporters Committee for Freedom of the Press; Radio-Television News Directors Association; Capital Cities/American Broadcasting Companies, Inc.; Cable News Network, Inc.; National Broadcasting Company, Inc.; and CBS Inc. (hereinafter the Reporters), and a non-profit citizens' group, Citizens United (Citizens) (collectively appellants), each appeal from a final order entered in the United States District Court[1] for the Eastern District of Arkansas denying their applications for access to a videotape recording of President William Jefferson Clinton's deposition testimony used at trial in the underlying criminal case.

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[1] The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

United States v. McDougal, No. LR-CR-95-173 (E.D. Ark. June 11, 1996). For reversal, appellants argue that the district court's denial of physical access to the videotape, so that they may make copies, violated their First Amendment and common law rights of access to judicial records. Citizens alone additionally argues [**2] that the district court erred in holding that it lacked standing to participate in the litigation over this access issue. These appeals were consolidated for oral argument, which was expedited at the Reporters' request. Following oral argument on August 12, 1996, we entered an order which stated "for reasons that will be stated in an opinion to follow, we affirm the district court's denial of access to the videotape."[2] *United States* v. *McDougal*, 92 F.3d 701 [*653] (8th Cir. 1996), amended, *id.* (Aug. 21, 1996) (amending caption to refer to Reporters Committee for Freedom of the Press, et al., as Movants-Appellants).[3] We now set forth our reasons for affirming the district court's order.

[**3] Background

The following summary of the background is largely taken from the district court's order. Slip op. at 1-4. Prior to the trial in the underlying criminal case, the defendants requested that a witness subpoena be issued to President Clinton requiring him

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[2] At oral argument, counsel for the Reporters stated "I would respectfully ask this court today, after you have concluded your conference on this case, to issue an order immediately, today, with an opinion to follow, so that we can get on with this matter."

[3] Based upon our order of August 12, 1996, the Reporters filed a petition for rehearing by the panel and a suggestion for rehearing en banc. Both were denied. United States v. McDougal, No. 96-2606 (8th Cir. Oct 3, 1996) (order denying petition for rehearing by the panel and suggestion for rehearing en banc).

to appear and give testimony at their criminal trial. One of the defendants further moved to compel President Clinton to testify in person. In response, President Clinton sought the district court's permission to testify by videotaped deposition pursuant to Fed. R. Crim. P. 15.[4] The district court ordered that the witness subpoena be issued, but granted the President's Rule 15 request.

[**4] On April 24, 1996, the district court ordered that the videotape of President Clinton's deposition be kept under seal and gave the parties and the President thirty days in which to file briefs regarding the handling of the videotape following its use at trial. The district court also invited any representatives of the news media to file briefs in their capacity as amicus curiae within the same thirty-day deadline.

The President's videotaped deposition was taken at the White House on April 28, 1996, and the district court judge presided from Little Rock via satellite. On May 3, 1996, the Reporters filed an amicus brief requesting that they be given physical access to the videotape immediately or, in the alternative, at the time of its display to the jury. None of the parties to the underlying criminal prosecution filed briefs concerning the access issue. On May 6, 1996, the district court

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[4] Rule 15 provides in pertinent part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.

entered an order in which the court stated that it would provide public access to the transcript of President Clinton's deposition after the presentation of the videotaped deposition testimony to the jury. The district court further indicated that access to the videotape would not be addressed [**5] until after May 24, 1996, the briefing deadline. The Reporters moved for reconsideration of the district court's denial of their request for immediate access to the videotape; on May 8, 1996, the district court denied the Reporters' motion.

In the meantime, counsel for the prosecution and counsel for the defendants had reviewed a draft of the entire written transcript of President Clinton's deposition and agreed to delete certain portions that generally contained objections and arguments of counsel. The transcript and the videotape were edited accordingly. The edited videotape was played for the jury on May 9, 1996. At that time, the courtroom was open to the public and filled to capacity. The public, including appellants, had an opportunity to view the edited videotape at the time and in the manner it was played to the jury in the courtroom.[5] The edited transcript was admitted into evidence and made a part of the record, and copies of the edited transcript were released to the public.

[**6] In addition to the Reporters' request for access to the videotape, Citizens filed an application for access to the videotape and Dow Jones & Co. (Dow Jones) requested a copy of the unedited transcript and access to the unedited videotape

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[5] At oral argument, counsel for Citizens United stated that the district court had indicated its willingness to schedule a showing of the videotape for members of the public who were unable to view the videotape at the trial.

of President Clinton's [*654] testimony.[6] The President filed a motion for a protective order requesting that the original videotape and all copies thereof, whether edited or unedited, remain under seal.

Upon consideration of the outstanding motions and applications before it related to the videotapes and transcripts of President Clinton's deposition testimony, the district court granted Dow Jones's request for the unedited transcript but denied all requests for access to the videotape. Slip op. at 10. In denying access to the videotape, the district court relied upon Nixon v. Warner Communications, Inc., 435 U.S. 589, 608, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) (where White House audiotapes had been played for the jury and the public, including the press, [**7] during the Watergate trial and transcripts had been furnished to the press, the Court of Appeals erred in reversing the district court's denial of the press's request for access to the audiotapes because (1) the common law right of public access to judicial records did not authorize the release of the tapes in question from the district court and (2) the press did not have a right of access to the audiotapes under the First or Sixth Amendments),[7] and United States v. Webbe, 791 F.2d 103 (8th Cir. 1986) (where audiotapes created pursuant to the federal wiretap statute had been played for the jury and the public, including the press, in a criminal mail fraud trial and transcripts

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[6] Dow Jones is not a party to the present appeals.

[7] In Nixon v. Warner Communications, Inc., 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), the district court declined to release for copying President Nixon's White House audiotapes, which had been admitted into evidence in the Watergate trial. The Court of Appeals for the D.C. Circuit reversed the district court's denial of access, and the Supreme Court reversed the D.C. Circuit, thereby upholding the district court's original ruling.

had been furnished to the press, the district court did not abuse its discretion, under a First Amendment or a common law analysis, in denying the press access to the audiotapes). In the present case, the district court held that the press's First Amendment right of access to public information had been "fully satisfied in this instance by allowing the press to attend the playing of the videotaped deposition and in providing full access to the written transcript." Slip op. at 6. As to the common law right [**8] of public access, the district court concluded that "the Court need not decide at this time whether the common law right of access applies to videotaped testimony because even assuming it does, the Court finds, on balancing all the relevant factors, that the press's request to copy the videotape must be denied." Id. at 7. The district court concluded that, on balance, the circumstances favored keeping the videotape under seal because: (1) substantial access to the information provided by the videotape had already been afforded; (2) release of the videotape would be inconsistent with the ban on cameras in the courtroom under Fed. R. Crim. P. 53;[8] (3) in other cases involving videotaped testimony of a sitting president, the tapes were not released; and (4) there exists a potential for misuse of the tape, a consideration specifically recognized in Nixon v. Warner Communications, Inc., 435 U.S. at 601(noting President Nixon's argument that the audiotapes could be distorted through cutting, erasing, and splicing). Slip op. at 7-9. In a footnote, the district court separately held that Citizens lacked standing to appear in the action and accordingly denied its application for [**9] access to the videotape. Id., slip op. at 2 n.2. These appeals followed.

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[8] Rule 53 provides "the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

Discussion

On appeal, appellants maintain that the district court's denial of access to the videotape violated their common law and First Amendment rights of access to judicial records. Thus, as a threshold matter, they argue that the videotape is a judicial record to which such rights attach, even though it is [**10] merely an electronic recording of a witness's testimony and was not itself admitted into evidence. Without citing any supporting authority, appellants argue that the videotape should be treated as a judicial record because [*655] "the defendants should not be permitted to circumvent the common law and constitutional rights to access by marking only the transcript of the videotaped deposition." Brief for Appellants (Reporters) at 13.[9] They also argue that, "effectively, the videotape was introduced into evidence by being played in open court." Id. Appellants conclude that "the videotape is like any other piece of evidence introduced or used in the courtroom. It becomes a judicial record subject to public review." Id.

Assuming that the videotape is a judicial record, appellants contend that the denial of access violated their common law and constitutional rights under this court's holding [**11] in In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988) (In re Search Warrant (Gunn)). In In re Search Warrant (Gunn), a newspaper had unsuccessfully asked the district court to unseal documents that had been used to obtain a search warrant. This court considered the question of whether the documents in question were "judicial records" for purposes of the First Amendment analysis and opined that they were. Id. at 573. We nevertheless affirmed the district court's

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[9] We address, primarily, the Reporters' arguments because they generally incorporate Citizens' arguments on the merits.

decision to keep the documents under seal on grounds that they contained sensitive information concerning an ongoing nationwide criminal investigation, and line-by-line redaction was not practicable. Id. at 574. In support of our disposition, we explained "the first amendment right of public access is not absolute; it is a qualified right." Id. "The documents may be sealed if the district court specifically finds that sealing is necessary to protect a compelling government interest and that less restrictive alternatives are impracticable." Id. at 575. Because we determined that those requirements had been met, we affirmed the district court's order. Id.[10] [**12] Appellants argue, in the present case, that their common law and First Amendment rights were violated because nondisclosure was not necessary to protect a compelling government interest. Brief for Appellant (Reporters) at 5 (addressing common law right), 16 (addressing First Amendment right). On this point, appellants

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[10] Judge Bowman separately concurred, stating his opinion that it was unnecessary to reach the question of whether the documents at issue actually were "judicial records" for First Amendment public access analysis. In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 575 (8th Cir. 1988) (In re Search Warrant (Gunn)). In any case, he reasoned, the public's interest in preserving the integrity of the ongoing investigation was "overwhelming" and necessarily overrode the public's interest in access. Id. at 576. He also indicated that his conclusion was based upon the "qualified" common law right of access. Id. ("the common law right of access to judicial records--a qualified right with the decision as to access left to the sound discretion of the trial court--is well established"). Judge Bowman further stated "this is all the more reason for leaving the first amendment question to another day and to a case that actually requires its resolution, which this case does not." Id. The third judge on the panel, Judge Heaney, dissented on the ground that the public's interest in access far outweighed the government's investigatory interests in that case. Id. at 576-77.

maintain that fear of misuse of the videotape in a political campaign does not constitute a compelling interest. They further assert, without citing authority, that "the only government interest associated specifically with the Office of the President that might justify sealing a judicial record is national security." Id. at 23. The Reporters maintain that this court's holding in In re Search Warrant (Gunn) indicates that there is in this circuit "a strong presumption in favor of the common law right of access," Brief for Appellants (Reporters) at 4, notwithstanding our statement in Webbe, 791 F.2d at 106, that "we decline to adopt in toto the reasoning of the Second, Third, Seventh, and District of Columbia Circuits in recognizing a 'strong presumption' in favor of the common law right of access." Citizens alone additionally argues that In re Search [**13] Warrant (Gunn) overruled Webbe and, if not, then this panel should take the opportunity to do so in the present case by holding that there is a strong presumption in this circuit in favor of public access to judicial records under the common law. Brief for Appellants (Citizens) at 19 n.4.

[**14] [*656] Appellants also challenge the district court's reliance on Nixon v. Warner Communications, Inc. and Webbe. They argue that Nixon v. Warner Communications, Inc. is not applicable to the present case because, in that case, the Presidential Recordings Act provided an alternative channel of access to the audiotapes in dispute.[11] In Webbe, they note, the

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[11] In the context of discussing the common law right of access, the Supreme Court noted sua sponte in Nixon v. Warner Communications, Inc., 435 U.S. at 603 & n.15, that, under the Presidential Recordings Act, a government archivist would be required to screen the Nixon White House audiotapes so that the tapes that were private in nature could be returned to the former president and those having historical interest could be made public.

press was denied access to wiretap audiotapes, which had been admitted into evidence, in part because there was a chance that the tapes would be used again as evidence in future trials related to other pending criminal charges. Appellants argue that no similar considerations exist in the present case, and we should therefore instead follow United States v. Poindexter, 732 F. Supp. 170 (D.D.C. 1990). In Poindexter, the District Court for the District of Columbia denied a request by members of the press for physical access to a videotape of former President Reagan's deposition testimony before its use at trial. Id. at 172. However, the district court commented in a footnote that "it is the Court's intention to provide such copies to the interested news media after the videotape is played at the trial [**15] itself." Id. at 172 n.2 (emphasis added). Appellants argue that, in the present case,[12] they should likewise be granted access to the videotape of President Clinton's testimony because it has already been played at trial.

[**16] Finally, as to the district court's reasoning that it was treating President Clinton's testimony in a manner equivalent to live testimony provided at trial (because cameras are not permitted in the court room under Fed. R. Crim. P. 53), appellants argue that the district court's decision to keep the videotape under seal actually gives the President special treatment because he was the one who requested permission to testify on videotape. Thus, they argue, the district court's

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[12] The defendants in the present case apparently did urge the district court not to release the videotapes on the ground that it would deny them a fair trial. Slip op. at 9 n.10. The district court acknowledged that one of the defendants was facing a second indictment, but nevertheless concluded that releasing the videotape would have little impact on that defendant's second trial and this factor did not weigh heavily against releasing the videotape. Id.

disposition violates their common law and First Amendment rights. We disagree.

Common law right of public access to judicial records

Upon careful review, we hold that appellants' common law right of public access to judicial records was not violated as a consequence of the district court's denial of physical access to the videotape of President Clinton's testimony. To begin, we hold as a matter of law that the videotape itself is not a judicial record to which the common law right of public access attaches. Appellants are incorrect to assume that this issue turns on whether or not the videotape itself was admitted into evidence and that, therefore, the litigants at trial have control to decide whether [**17] or not the public's right may be exercised. See Brief for Appellants (Reporters) at 13 ("The defendants should not be permitted to circumvent the common law and constitutional rights to access by marking only the transcript of the videotaped deposition."). Even if the defendants had moved for the admission of the videotape into evidence, the videotape itself would not necessarily have become a judicial record subject to public review. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. at 591 (audiotapes, which were kept under seal, had been admitted into evidence at trial); Webbe, 791 F.2d at 104 (same). We conclude, for reasons unrelated to the fact that the videotape was never admitted into evidence, that the videotape itself is not a judicial record for purposes of this analysis.

The district court in the present case declined to decide whether the videotape itself was a judicial record to which the common law right attaches, but did note that courts are divided over whether a videotape of witness testimony, taken pursuant to Fed. [*657] R. Crim. P. 15, is a judicial record. Slip op. at 6-7 (comparing, for example, Application of American

Broadcasting Cos., [**18] 537 F. Supp. 1168, 1171-72 (D.D.C. 1982) (Application of ABC) (holding that a videotape of a Rule 15 deponent's testimony is not a judicial record for purposes of broadcasters' right of access because otherwise such deponents would be subject to "exceptional treatment" as compared with other witnesses), with In re Application of CBS, Inc., 828 F.2d 958 (2d Cir. 1987) (holding that, absent extraordinary circumstances, the press has a common law right to inspect and copy the videotape of depositions used at trial where the witness is unable to provide live testimony; privacy interests of an ill witness were not sufficiently extraordinary to preclude press access)).

In Nixon v. Warner Communications, Inc. and Webbe, the audiotapes in dispute were recordings of the primary conduct of witnesses or parties. Therefore, those recordings were similar to documentary evidence to which the common law right of public access ordinarily may apply. By contrast, the videotape at issue in the present case is merely an electronic recording of witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury [**19] in the courtroom, we hold that there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony. By comparison, Rule 53 of the Federal Rules of Criminal Procedure prohibits photography or other electronic recording of live witness testimony in the courtroom. Our holding today comports with Rule 53 because it mandates that Rule 15 deponents are treated equally to witnesses who testify in court, in person. Accord Application of ABC, 537 F. Supp. at 1171-72. In other words, contrary to appellants' argument, our holding does not give special treatment to Rule 15 deponents vis-a-vis witnesses who present live in-court testimony but

rather puts them on equal footing.[13] Accordingly, we conclude that appellants have failed to assert a cognizable common law claim in the present case because the videotape itself is not a judicial record to which the common law right of public access attaches.

[**20] Even if we were to assume that the videotape is a judicial record subject to the common law right of public access, we would hold that the district court did not abuse its discretion in denying access in the present case. The legal standards governing the common law right are well-established in this circuit. This court stated in Webbe "the consideration of competing values is one heavily reliant on the observations and insights of the presiding judge." 791 F.2d at 106 (agreeing with the Fifth Circuit's standard in Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431-34 (5th Cir. 1981)). Although we recognize that there is a common law presumption in favor of public access to judicial records, Nixon v. Warner Communications, Inc., 435 U.S. at 602, we note that this court in Webbe specifically rejected the strong presumption standard adopted by some circuits. 791 F.2d at 106 ("we decline to adopt in toto the reasoning of the Second, Third, Seventh, and District of Columbia Circuits in recognizing a 'strong presumption' in favor of the common law right of access"); see also Webster Groves

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[13] Nor can it be said that President Clinton has received special treatment because the district court permitted him to testify by videotaped deposition. See United States v. Poindexter, 732 F. Supp. 142, 144-46, 159-60 (D.D.C. 1990) (surveying instances where presidents of the United States have been called upon to provide testimony and concluding that former President Reagan was not immune from being subpoenaed to testify for a criminal trial; however, consistent with a longstanding tradition of not requiring in-court presidential testimony, he could testify by videotaped deposition).

Sch. Dist. v. Pulitzer Publishing Co., 898 F.2d 1371, 1376 (8th Cir. 1990) [**21] ("when the common law right of access to judicial records is implicated we give deference to the trial court rather than taking the approach of some circuits and recognizing a 'strong presumption' favoring access"). Contrary to appellants' assertions, the "compelling government interest" test applied in In re Search Warrant (Gunn), 855 F.2d at 754, may not be interpreted as incorporating a strong presumption favoring public access for purposes [*658] of the common law right. In that case, we employed the compelling interest test in the context of determining whether the qualified First Amendment right of public access attached to specific documents which we had found to be judicial records. Id.[14]

[**22] Moreover, our deferential standard under the common law is in harmony with the Supreme Court's analysis in Nixon v. Warner Communications, Inc., 435 U.S. at 598, in which the Court stated that "every court has supervisory power over its own records and files, and access has been denied where the court files might become a vehicle for improper purposes." The Supreme Court concluded, with respect to the common law right of public access, "the decision as to access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Id. at 599.

We now turn to the district court's balancing of competing interests in the present case. As noted above, the district court

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[14] Citizens' argument that we overruled United States v. Webbe, 791 F.2d 103 (8th Cir. 1986), in In re Search Warrant (Gunn), fails not only on the merits but also because a panel of this court lacks authority to overrule a prior panel decision. For this reason, we also could not now overrule Webbe, as Citizens urges.

concluded that, even assuming the videotape is a judicial record for purposes of the common law analysis, the circumstances favored keeping the videotape sealed because: (1) substantial access to the information provided by the videotape had already been afforded; (2) release of the videotape would be inconsistent with the ban on cameras in the courtroom under Fed. R. Crim. P. 53; (3) in other cases involving videotaped testimony [**23] of a sitting president, the tapes were not released; and (4) there exists a potential for misuse of the tape, a consideration specifically recognized in Nixon v. Warner Communications, 435 U.S. at 601 (noting President Nixon's argument that the audiotapes could be distorted through cutting, erasing, and splicing). Slip op. at 7-9. In addition to these sound reasons stated by the district court, we note the following compelling considerations which further support the conclusion that the district court did not abuse its discretion.

In Nixon v. Warner Communications, Inc., 435 U.S. at 602-03, the Supreme Court considered it a "crucial fact" that giving the press access to the audiotapes for purposes of making copies involved "a court's cooperation in furthering their commercial plans." The Supreme Court further explained that the courts have

> a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material [**24] "to gratify private spite or promote public scandal," with no corresponding assurance of public benefit.

Id. at 603 (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259

(1893)). We agree, as a matter of public policy, that courts should avoid becoming the instrumentalities of commercial or other private pursuits.

We also note that granting access to the videotape of President Clinton's testimony could harm the strong public interest in preserving the availability of material testimony in criminal trials. On the other hand, the public's interest in gaining access to the videotape recording is only marginal because the testimony has already been made visually and aurally accessible in the courtroom and the transcript has been widely distributed and publicized.

Finally, as a matter of historical interest and public policy, there has never been compelled in-court live testimony of a former or sitting president, nor has there ever been compelled dissemination of copies of a videotape recording of a sitting president's testimony.[15] These facts, we think, suggest that [*659] there is a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting president, [**25] which further supports our conclusion that the district court did not abuse its discretion in the present case.

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[15] In United States v. Poindexter, 732 F. Supp. 170 (D.D.C. 1990), which was decided by the District Court for the District of Columbia, President Reagan was not the sitting president at the time he testified. Moreover, no reasons were given by the district court to explain its comment, in dicta, that it intended to release the videotape after the tape had been used at trial. Id. at 172 n.2. We see no reasonable basis for reading into that decision the holding that the press had a common law right of access to the videotape of President Reagan's deposition. Cf. Application of American Broadcasting Cos., 537 F. Supp. 1168, 1172 (D.D.C. 1982) (holding that common law right does not extend to videotape of Rule 15 deponent's testimony).

First Amendment right of access to public information

Upon de novo review, we also agree, as a matter of law, with the district court's holding [**26] that the First Amendment right of access to public information does not extend to the videotape of President Clinton's deposition testimony. As the district court noted, members of the public, including the press, were given access to the information contained in the videotape. Therefore, appellants received all the information to which they were entitled under the First Amendment.

In addressing the press's First Amendment right to public information as applied to the facts in Nixon v. Warner Communications, Inc., the Supreme Court stated:

> There simply were no restrictions upon press access to, or publication of any information in the public domain. Indeed, the press — including reporters of the electronic media — was permitted to listen to the tapes and report on what was heard. Reporters were also given transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is [**27] guaranteed access, but whether these copies of the White House tapes — to which the public has never had physical access — must be made available for copying.
> ...

The First Amendment generally grants the press no right to information superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may

publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public." 435 U.S. at 609 (quoting Estes v. Texas, 381 U.S. 532, 589, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965) (Harlan, J., concurring)). In other words, in Nixon v. Warner Communications, Inc., the Supreme Court held that, where access to audiotapes was sought by the press on grounds that they were public information, the press's First Amendment right was adequately protected because members of the public, including the press, were (1) permitted to listen to the audiotapes as they were played to the jury in the courtroom and (2) furnished with copies of the written transcript. Under these circumstances, the First [**28] Amendment right of public access did not extend to the audiotapes themselves. Similarly, in the present case, the First Amendment right does not extend to the videotape in dispute.[16]

Conclusion

For the foregoing reasons, we affirm the district court's denial of access to the videotape, as to both the Reporters and Citizens. Because we dispose of this case on the merits of appellants' common law and First Amendment claims, we find it unnecessary to address the standing issue raised by Citizens. [*660] The order of the district court is affirmed. Judgment shall be entered accordingly.

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[16] By contrast to the present case, we held in In re Search Warrant (Gunn) that "the first amendment right of public access does extend to the documents filed in support of search warrant applications." 855 F.2d at 573 (emphasis added). We therefore proceeded to address the issue of whether nondisclosure was necessary to protect a compelling government interest, which is not a relevant issue in the present case.

United States of America, Plaintiff, v. James B. McDougal; Jim Guy Tucker; Susan H. McDougal; Defendants. Reporters Committee for Freedom of the Press; Radio-Television News Directors Association; Capitol Cities/American Broadcasting Companies; Cable News Network, Inc.; National Broadcasting Company, Inc.; CBS, Inc.; Movants-Appellants, v. Dow Jones and Company, Inc.; Movant, William Jefferson Clinton, The President of the United States in his official capacity, Interested Party-Appellee. United States of America, Plaintiff, v. James B. McDougal; Jim Guy Tucker; Susan H. McDougal; Defendants. Reporters Committee for Freedom of the Press; Radio-Television News Directors Association; Capitol Cities/American Broadcasting Companies; Cable News Network, Inc.; National Broadcasting Company, Inc.; CBS, Inc.; Movants, v. Dow Jones and Company, Inc.; Movant, William Jefferson Clinton, The President of the United States in his official capacity, Interested Party-Appellee. Citizens United, Interested Party-Appellant.

No. 96-2606, No. 96-2671

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

92 F.3d 701; 1996 U.S. App. LEXIS 20417

August 12, 1996, Submitted
August 12, 1996, Filed

SUBSEQUENT HISTORY: [**1] The Name of this Case has been Corrected by the Court August 21, 1996.

PRIOR HISTORY: Appeals from the United States District Court for the Eastern District of Arkansas. 95-CR-173. George Howard, Jr., U.S. District Judge.

DISPOSITION: Affirmed.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Rod J. Rosenstein, U.S. DEPARTMENT OF JUSTICE, Criminal Division, Washington, DC. W. Ray Jahn, OFFICE OF THE INDEPENDENT COUNSEL, Little Rock, AR.

For JAMES B. MCDOUGAL, Defendant - Appellee: Sam T. Heuer, Little Rock, AR.

For JIM GUY TUCKER, Defendant - Appellee: James J. Lessmeister, Little Rock, AR. William H. Sutton, FRIDAY & ELDREDGE, Little Rock, AR. Darrell F. Brown, DARRELL F. BROWN & ASSOCIATES, Little Rock, AR. George B. Collins, Chicago, IL.

For SUSAN H. MCDOUGAL, Defendant - Appellee: Bobby R. McDaniel, MCDANIEL & WELLS, Jonesboro, AR. Jenniffer Morris Horan, FEDERAL PUBLIC DEFENDER'S OFFICE, Little Rock, AR.

For REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CAPITOL CITIES/AMERICAN BROADCASTING COMPANIES, CABLE NEWS NETWORK, INC., NATIONAL BROADCASTING COMPANY, INC., CBS, INC., (96-2606), Movants - Appellants: Philip S. Anderson, WILLIAMS & ANDERSON, Little Rock, AR.

For WILLIAM JEFFERSON CLINTON, [**2] The President of the United States in his official capacity, (96-2606), Interested Party - Appellee: John Rodney Tisdale, Gregory Turner Jones, WRIGHT & LINDSEY, Little Rock, AR. Stephen W. Preston, U.S. DEPARTMENT OF JUSTICE, Washington, DC. Michael S. Raab, U.S. DEPARTMENT OF JUSTICE, Civil Division, Washington, DC. Douglas Letter, U.S. DEPARTMENT OF JUSTICE, Civil Division, Appellate Staff, Washington, DC.

For REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CAPITOL CITIES/AMERICAN BROADCASTING COMPANIES, CABLE NEWS NETWORK, INC., NATIONAL BROADCASTING COMPANY, INC., CBS, INC., (96-2671), Movants - Appellees: Philip S. Anderson, WILLIAMS & ANDERSON, Little Rock, AR.

For WILLIAM JEFFERSON CLINTON, The President of the United States in his official capacity, (96-2671), Interested Party - Appellee: John Rodney Tisdale, Gregory Turner Jones, WRIGHT & LINDSEY, Little Rock, AR. David Evan Kendall, WILLIAMS & CONNOLLY, Washington, DC. Stephen W. Preston, U.S. DEPARTMENT OF JUSTICE, Washington, DC. Scott R. McIntosh, U.S. DEPARTMENT OF JUSTICE, Civil Division, Washington, DC. Douglas Letter, U.S. DEPARTMENT OF JUSTICE, Civil Division, [**3] Appellate Staff, Washington, DC.

For CITIZENS UNITED, (96-2671), Interested Party - Appellant: Donald C. Donner, DONNER & SHAHAN, Fayetteville, AR.

JUDGES: Before McMILLIAN, FLOYD R. GIBSON and MAGILL, Circuit Judges.

OPINION: [*702] PER CURIAM.

Before this court are appeals from a final order of the United States District Court for the Eastern District of Arkansas granting a motion for a protective order filed by President William Jefferson Clinton and denying appellants access to a videotape of President Clinton's deposition testimony. United States v. McDougal, No. LR-CR-95-173 (E.D. Ark. June 11, 1996). For reasons that will be stated in an opinion to follow, we affirm the district court's denial of access to the videotape.

UNITED STATES OF AMERICA, PLAINTIFF v. JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL, DEFENDANTS

NO. LR-CR-95-173

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

940 F. Supp. 224; 1996 U.S. Dist. LEXIS 20559; 24 Media L. Rep. 1917

June 11, 1996, Decided
June 11, 1996, FILED

DISPOSITION: [**1] Motion of the President for a protective order granted to the extent that all copies of the videotape of President Clinton's deposition shall remain under seal until further Order of the Court. Application of the Reporters Committee for access denied; Dow Jones' petition to intervene and application for access granted in part and denied in part. Dow Jones' request for access to the unedited written transcript of the deposition granted.

COUNSEL: For United States of America, PLAINTIFF: Jackie M. Bennett, Washington, D.C. Bradley E. Lerman, Chicago, IL. Amy Joan St. Eve, Chicago, IL. William R. Jahn, Little Rock, AR. Leroy M. Jahn, Little Rock, AR. Rod J. Rosenstein, Washington, D.C.

For James McDougal, DEFENDANT: Sam T. Heuer, Little Rock, AR.

For William J. Clinton: John R. Tisdale, Little Rock, AR.

For Dow Jones & Co.: George J. Bequette, Little Rock, AR.

For CBS, Inc., CNN, Radio Television News, Capital Cities/ABC, NBC: Philip S. Anderson, Little Rock, AR.

For Susan McDougal, DEFENDANT: No Attorney Assigned.
For Jim Guy Tucker, DEFENDANT: No Attorney Assigned.

JUDGES: George Howard, Jr.,
UNITED STATES DISTRICT JUDGE

OPINION: [*225] ORDER

On [**2] February 5, 1996, the Court granted the request of defendants Susan H. McDougal and James B. McDougal for an order directing the Clerk of the Court to issue a witness subpoena for President William Jefferson Clinton to appear and give testimony during their trial. James B. McDougal then moved to compel the personal attendance of President Clinton at trial. In response, President Clinton requested that he be allowed to testify by videotape deposition at a time and place of his choosing consistent with the discharge of his constitutional office.

In an Order dated March 20, 1996, the Court granted President Clinton's request that his testimony be taken by videotaped deposition pursuant to Fed. R. Crim. P. 15. On April 24, 1996, the Court ordered that the videotape be sealed and asked the parties to submit briefs within thirty days on the handling and release of the videotape after the deposition was played to the jury.[1]

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[1] The April 24th Order stated in relevant part:

[**3] On April 28, 1996, the videotaped deposition of President Clinton was taken at the White House, with the Court presiding via satellite in Little Rock, Arkansas. Pursuant to inquiries from the press and in recognition of the press' role "in preserving and perpetuating democracy in this nation over the centuries," the Court invited any representatives of the news media to file an amicus curiae brief with the Court on or before May 24, 1996.[2]

On May 3, 1996, a number of media organizations filed an application for access to the videotape [**4] deposition before

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> The Court has received inquiries from the media, the interested parties, and the public concerning release of the videotape of President Clinton's deposition. The Court directs counsel for the government, defendants, and the President to file within thirty days memoranda articulating their position with regard to the handling and release of the videotape.
>
> Pending a final Order of the Court, the Court directs that after the videotape of the President's deposition is presented at trial all copies of the videotape be delivered to the Clerk of the Court to be placed under seal.

[2] On May 13, 1996, an application for release of the videotaped testimony was filed by Citizens United, which according to its application "is a non-profit organization...which has played a crucial role in providing the public with information regarding the Whitewater scandal."

Citizen United is a not a party to this action and is not a news media organization. The Court therefore finds that it does not have standing to appear in this action and its application is denied.

or at the time it was to be played to the jury.[3] The Court denied the application on May 6, 1996, and on [*226] May 8, 1996, denied the media organizations' motion for reconsideration.[4]

The edited videotape deposition was played to the jury in open court on May 9, 1996, and a transcript was thereafter immediately released to the public.[5] Jury deliberations began on May 16, 1996, and on May 28, 1996, the jury returned verdicts of guilty on eighteen counts against James [**5] B. McDougal, two counts against Jim Guy Tucker, and four counts against Susan H. McDougal.[6]

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[3] The applicants (hereinafter referred to as "media organizations") were Reporters Committee for the Freedom of the Press, Radio-Television News Directors Association, Capital Cities/American Broadcasting Companies, Inc. ("ABC"), Cable News Network, Inc. ("CNN"), National Broadcasting Company, Inc. ("NBC"), and CBS, Inc.

[4] The applicants filed an appeal and a petition for expedited review in the United States Court of Appeals for the Eighth Circuit. The Circuit Court dismissed the appeal on May 17 for lack of jurisdiction.

[5] After the deposition was taken, counsel for the government and the defendants reviewed a draft of the entire written transcript, and agreed to delete certain portions that generally contained objections and argument of counsel. The videotape was then edited in compliance with the written corrections, and a written edited transcript was made part of the record.

[6] The August 17, 1995, Indictment charged defendants with criminal wrongdoing in financial transactions involving Madison Guaranty Savings & Loan Association and Capital Management Services, Inc., a small business investment company licensed by the Small Business Administration.

On May 24, 1996, Dow Jones & Company, Inc. ("Dow Jones") filed a petition to intervene and an application for access to the unedited videotape and transcript of President Clinton's deposition.[7] President Clinton filed a motion for a protective order to preclude the distribution [**6] of the original and any copies of the videotape deposition testimony.

The Court is well aware of the constitutional right of the press and the public to attend a criminal trial. "[A] trial courtroom...is a public place where the people generally — and representatives of the media — have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980). Here, the Court, in recognition of the important role the press plays in ensuring "public scrutiny of a criminal trial," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982), provided the media with virtually unlimited access to court proceedings. Only in a few instances where a compelling governmental interest required closure of the proceedings, was the press barred.[8] [**7]

The issue before the Court is not the right to access by the press or the public to the videotaped deposition. Access has been provided. The videotape was played in open court, to a

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[7] Dow Jones is publisher of The Wall Street Journal and various other news publications and services.

[8] In an effort to ensure full access to court proceedings, the Court generally allowed media representatives to attend in-chamber conferences. The Court made available daily transcripts of the proceedings, which included bench conferences.

courtroom full to capacity. The Court tried diligently to accommodate members of the press to ensure that they would be able to view the videotape. The Court made written copies of the deposition testimony available to the public immediately after the videotape was played and a number of newspapers printed the deposition in its entirety.

Rather, the issue is whether the public has a right to obtain copies of the videotape recording itself. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 609, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) ("Thus, the issue presented in this case is not [**8] whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes — to which the public has never had physical access — must be made available for copying.") The press argues that it has both a common law and constitutional right to the videotape.

The Supreme Court has made clear that the Constitution does not provide the press the right under the First Amendment to copy a tape introduced into evidence, as long as the Court allows access to the information contained on the tape by other means.

The First Amendment generally grants the press no right of information about a [*227] trial superior to that of the general public. 'Once beyond the confines of the courthouse, a news gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.' Warner Communications, 435 U.S. at 609-610 (quoting Estes v. Texas, 381 U.S. 532, 589, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965) (Harlan, [**9] J. concurring)). The Eighth Circuit, relying on Warner Communications, found

that the press did not have a constitutional right to copy audiotapes that were admitted into evidence in a mail fraud trial. United States v. Webbe, 791 F.2d 103, 105 (8th Cir. 1986).

The Court therefore finds that the press does not have a constitutional right to copy the videotape. The First Amendment right of the press is fully satisfied in this instance by allowing the press to attend the playing of the videotaped deposition to the jury and in providing full access to the written transcript. See Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 427 (5th Cir. 1981) (no First Amendment right to copy audiotapes between defendants and FBI agents in connection with sting operation concerning alleged bribery in awarding state employee insurance contracts in Texas. "Constitutional requirements are fully satisfied by the kind of untrammeled access to the information" provided where the members of the press allowed to listen as tapes played in court and transcripts were prepared and distributed for their use.)

Dow Jones and the media organizations argue that they have a common law right of access to [**10] the videotape. The common law right of access to judicial records and documents is well established. The right, however, is not absolute, and the decision as to access is left to the Court's sound discretion. Webbe, 791 F.2d at 106.

President Clinton and the defendants argue that the common law right of access does not apply to a deposition, as the videotape itself was not admitted into evidence. As noted by the district court in denying the press' request to copy the videotaped deposition of Jodie Foster, a witness in the prosecution of John Hinckley, the taped testimony should be treated in the same fashion as the testimony of any live witness at trial. The court concluded that the videotaped deposition "is not encompassed by the common law right of access to judicial

records and the broadcasters, therefore, have no right to copy and broadcast the recording." Application of American Broadcasting Companies, Inc., 537 F. Supp. 1168, 1172 (D.D.C. 1982). See also United States v. Beckham, 789 F.2d 401, 411 (6th Cir. 1986) (transcripts are not public records as they were not admitted into evidence; therefore no common law right to inspect and copy).

However, the court in [**11] In re Application of CBS. Inc., 828 F.2d 958 (2d Cir. 1987) held contrary, finding that the right to copy and inspect judicial records includes videotaped depositions. See also Smith v. United States District Court, 956 F.2d 647 (7th Cir. 1992) (common law right of access not limited to items in evidence; judicial records include everything that is part of the court proceedings).

The Court need not decide at this time whether the common law right of access applies to videotaped testimony because even assuming it does, the Court finds, on balancing all the relevant factors, that the press' request to copy the videotape must be denied.

In weighing the factors, the Court has considered the strong interest of the public and the press in access to judicial proceedings and in obtaining important information. However, a number of factors militate against release of the videotape for copying. First, as discussed above, the press has attended the trial, reported the events of the trial to the public, and had a transcript of the videotaped deposition available to it. Thus, "substantial access" has already been accorded the press and public. See Webbe, 791 F.2d at 106 (cites omitted). [**12]

Second, the Court is not persuaded that access to the videotaped testimony of the President should be treated differently from that of any other witness. The Court, in its

[*228] March 20, 1996, Order authorizing that President Clinton's testimony be taken by a Rule 15 videotaped deposition found that "in-court testimony would be unduly burdensome to the President in the performance of his official duties." Had President Clinton testified live at the trial, Rule 53 of the Federal Rules of Criminal Procedure, and Local Rule F-5 would have prohibited photographing or broadcasting any of the testimony. See also Conway v. United States, 852 F.2d 187 (6th Cir. 1988). To single the deposition testimony out for special treatment would contravene the Court's concern with accommodating the interests of the Presidency and might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties.

Third, the Court has considered the unique circumstances of this case and the manner in which the depositions of Presidents Ford and Carter were handled. In each of those instances, the district court proscribed public access to the tape.[9] [**13]

Fourth, the Court has considered the potential for misuse of the tape. In this regard, the Court does not believe that the press has improper motives in obtaining the videotape or would seek to distort or misuse it. Nevertheless, once released and rebroadcast, the press cannot maintain control over individuals who might copy the broadcast and edit it to suit their purposes. The Supreme Court in Warner Communications recognized the

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[9] The court in United States v. Fromme, CR-S-75-451, ordered that the tape be retained in the safe of the Clerk of the Court for the Eastern District of California and not be released to anyone except on order of the Court. Similarly, in United States v. Kidd, the court's order of April 10, 1978, provided that the videotape would not be furnished to anyone other than the court.

potential for abuse if the Nixon tapes were released. "Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing [**14] of tapes." 435 U.S. at 601.

In sum, the balance of factors weigh in favor of denying the press' request to copy the videotape.[10] The Court will grant the President's request for a protective order, and the videotape, both edited and unedited, will remain under seal until further Order of the Court.

Dow Jones also asks that the Court release the unedited portions of the transcript that remain under seal. The President, government, and defendants do not object to this request. The Court is of the opinion that releasing a written transcript of the unedited portions of the deposition is in keeping with its policy of [**15] providing the press with full access to the proceedings.[11]

Thus, the Court directs the court reporter to prepare a written transcript of the entire deposition which will be made a part of the official record in this case.[12]

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[10] The Court has also considered defendants' argument that release of the videotape would deny them a fair trial. Defendant Tucker is facing a second indictment which has not yet gone to trial. The Court, however, is of the opinion that the release of the videotape would have little impact on Tucker's second trial and that this factor does not weigh heavily in favor of not releasing the videotape.

[11] Had President Clinton testified at trial, the press would have had access to the objections and argument of counsel.

[12] There is no longer a need to keep the court reporter's tapes, notes and computer diskettes under seal and they will be returned to the

Accordingly, the motion of the President for a protective order is granted to the extent that all copies of the videotape of President Clinton's deposition shall remain under seal until further Order of the Court. The Application of the Reporters Committee for access is denied; Dow Jones' petition to intervene and application for access is granted [**16] in part and denied in part. The Court will grant Dow Jones' request for access to the unedited written transcript of the deposition.

IT IS SO ORDERED this 11th day of June, 1996.

George Howard, Jr.

UNITED STATES DISTRICT JUDGE

---

reporter.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2671EALR

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
v.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
	*	
Citizens United,	*	
	*	
Appellant.	*	

(See attached for complete style.)

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Beam would grant the suggestion.

The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold, Judge Morris Sheppard Arnold, and Judge Murphy took no part in the consideration of decision of this case.

February 10, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2671EALR

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United
vs.	*	States District Court for the
	*	Eastern District of Arkansas
Citizens United,	*	
	*	
Appellant.	*	

The court has conducted a preliminary jurisdictional review in this appeal and has concluded that the matter should be allowed to proceed to briefing and oral argument. The clerk is directed to set and enforce the following expedited briefing schedule:

Appellant's brief and appendix	July 12, 1996
Appellee's brief and appendix (if required)	July 26, 1996
Appellant's reply brief	August 2, 1996

No extensions will be granted and no mailing grace will be allowed. All briefs must be received in the St. Louis clerk's office on the date indicated. Counsel are further directed to serve their briefs on each other by overnight delivery service or hand-delivery.

Citizen's United's opening brief should address the issue of standing. The brief may also address the merits of its application for release of Mr. Clinton's videotaped testimony.

It is further ordered that oral argument in this matter be set for Monday, August 12, 1996 at 12:00 p.m in St. Louis, Missouri.

The case will be set on the calendar with No. 96-2606, the appeal by the Reporter's Committee. The parties will be advised of the time to be allowed for oral argument at a later date.

June 27, 1996

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. LR-CR-95-173

JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL DEFENDANTS

ORDER

Pending before the Court is the motion of defendant James B. McDougal ("McDougal") to compel the personal attendance of President Clinton at the trial.[1] McDougal states that the President's personal appearance at trial is critical. He contends that requiring the President to travel to Arkansas to testify would be the most expedient and efficient manner in which to obtain the President's testimony. McDougal proposes that to accommodate the President's schedule. the President testify at a Saturday session of Court sometime in April.

The Department of Justice ("DOJ"), on behalf of the President in his official capacity, filed a response in opposition to McDougal's motion.[2] McDougal filed a motion to strike DOJ's response contending that as the Attorney General and the

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[1] By Order dated February 5, 1996, the Court granted the request of defendants Susan H. McDougal and James B. McDougal for an order directing the Clerk of the Court to issue a witness subpoena for President Clinton to appear and give testimony during their trial.

[2] Counsel for the President in his personal capacity field a memorandum in opposition to McDougal's motion which adopted the Department of Justice's memorandum.

DOJ have recused in this case, the President can only be represented by White House Counsel or his personal lawyer.

The Attorney General's and DOJ's appearance on behalf of the President in this action is unaffected by the investigative and prosecutorial functions of the Independent Counsel. Here, the Attorney General retains the statutory authority to represent the President's interests with regard to the President testifying in this matter. See 28 U.S.C. §517. Thus, there is no basis to strike the President's response.

With regard to the merits of McDougal's request, President Clinton argues that he should be allowed to testify by videotaped deposition at a time and place of his choosing which is consistent with the President's discharge of his constitutional office. President Clinton states that such a deposition is provided for under Rule 15 of the Federal Rules of Criminal Procedure.[3]

Rule 15(a) provides in pertinent part:

> Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition....

Motions under Rule 15(a) should be reviewed on a case-by-case basis, "examining whether the particular characteristics of each case constitute 'exceptional circumstances.'" United States v. Dillman, 15 F.3d 383, 398 (5th Cir. 1994) (citation omitted). The burden is on the party requesting the deposition to

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[3] Although President Clinton raises his request in his response to McDougal's motion to compel, the Court will construe the President's response as a motion pursuant to Rule 15(a).

established exceptional circumstances. United States v. Drogoul, 1 F.3d 1046, 1552 (11th Cir. 1993).

President Clinton states that the testimony of a sitting President is an exceptional circumstance justifying the use of a deposition. He points out that no sitting President has ever been directed to provide in-court testimony. In the few cases where the issue has arisen, the courts have recognized the unique status of the President as Chief Executive. Thus, in United States v. Fromme, 405 F. Supp. 578 (E. D. Cal. 1975) a defendant charged with attempting to assassinate President Ford sought his testimony at her trial. The court found that the defendant's right to a fair trial and the President's special status could be accommodated by a videotaped deposition under Rule 15.

In United States v. Poindexter, 732 F. Supp. 142 (D.D.C. 1990), the court found that the testimony of former President Reagan at the trial of his former National Security Advisor arising from the "Iran-Contra Affair" should be taken by deposition. The court noted that the videotaped deposition adequately protected the right of the defendant to a fair trial.

In this instance, the Court is of the opinion that requiring President Clinton to travel to Arkansas to provide in-court testimony would be unduly burdensome to the President in the performance of his official duties. See Fromme, 405 F. Supp. at 583 ("In recognition of the high office of the President and being mindful of the inconvenience and burden the subpoena will impose upon him, the court will not require the President to come to court to present his testimony..."). Thus, the Court finds that exceptional circumstances exist and that the testimony of President Clinton shall be taken by videotape deposition pursuant to Rule 15 of the Federal Rules of Criminal Procedure. The Court further finds that a videotaped deposition protects defendants' rights to a fair trial and an adequate defense.

President Clinton proposes a number of restrictions with regard to the taking of the deposition. The government, through the Office of the Independent Counsel ("Independent Counsel"), also proposes certain restrictions. With regard to the

deposition, the Court directs the parties to consult with counsel for the President concerning the method of videotaping and file with the Court either a stipulation as to the procedure or a notice of their disagreement within five days of the date of this Order. The Court is not persuaded that the deposition should take place in a federal courtroom as requested by the Independent Counsel. Rather, the deposition can take place at the White House, but any insignia associated with the Office of President (such as the Presidential Seal) should not be displayed. Counsel for the President as well as counsel for ht e parties may be present at the deposition.

Counsel for the parties and the President are also ordered to propose to the Court a date for the President's testimony following the testimony of David Hale. If the parties are unable to agreed to a date, the Court will set the date.

President Clinton requests that counsel for defendants submit their proposed questions to the Court and counsel to the President to ensure that the parties not engage in improper or unauthorized examination. Such a procedure was used in Poindexter.

The Court is not persuaded that a prior determination of the proposed questions is warranted in this instance. McDougal, as well as his co-defendant Susan McDougal, state that President Clinton's testimony is necessary to respond to assertions by David Hale. The Court is of the opinion that all counsel in this case will comport themselves professionally and not delve into irrelevant or inappropriate areas of inquiry. As the anticipated testimony of President Clinton concerns events prior to his Presidency, matters of national security should not be of concern. Furthermore, the Court will preside over the deposition by videoconferencing, and will rule on any objections at the time of the deposition.

Following the deposition, the parties are ordered to consult on any necessary editing of the videotape prior to its presentation at the trial. If the parties are unable to agree on the editing, the Court will resolve the matter.

The original of the videotape will be held by the court with copies provided only to the parties and counsel to the President. Copies may not be provided to others unless and until the tape is played at trial and then only in the form presented at trial.

Accordingly, McDougal's motion to compel the personal appearance of President Clinton is denied; the testimony of President Clinton shall be taken by videotaped deposition pursuant to Fed. R. Crim. Pr. 15. The motion of Susan McDougal (filed March 12, 1996) to adopt McDougal's motion is granted. McDougal's motion to strike, the response is denied.

IT IS SO ORDERED this 20th day of March, 1996.

/s/George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. LR-CR-95-173

JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL DEFENDANTS

ORDER

The parties have presented a stipulation concerning the videotaped deposition testimony of President Clinton. The Court approves the stipulation and has directed that it be filed under seal.

The deposition will be closed to the public, and only those persons approved by the Court as set forth in the stipulation will be allowed to attend. With the exception of stating the date of the deposition, all persons present at the deposition are ordered to refrain from discussing any aspect of the deposition, including the substance of the President's testimony.

IT IS SO ORDERED this 2 day of April, 1996.

/s/George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. LR-CR-95-173

JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL DEFENDANTS

ORDER

The Court has received inquiries from the media, the interested parties, and the public concerning release of the videotape of President Clinton's deposition. The Court directs counsel for the government, defendants, and the President to file within thirty days memoranda articulating their position with regard to the handing and release of the videotape.

Pending a final Order of the Court, the Court directs that after the videotape of the President's deposition is presented at trial all copies of the videotape be delivered to the Clerk of the Court to be placed under seal.

IT IS SO ORDERED this 24th day of April, 1996.

/s/George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. LR-CR-95-173
	)	Hon. George
JAMES B. MCDOUGAL, JIM	)	Howard, Jr.
GUY TUCKER, and SUSAN	)	
MCDOUGAL,	)	
Defendants.	)	

APPLICATION OF CITIZENS UNITED FOR RELEASE OF THE VIDEOTAPED TESTIMONY OF PRESIDENT WILLIAM J. CLINTON UPON COMPLECTION OF THE TRIAL

Applicant Citizens United, by and through its counsel, Donald C. Donner and Michael R. Shahan, move this Honorable Court for leave to seek the release of the videotaped testimony of President William J. Clinton upon the completion of the trial in the instant case, and in support of their application, state as follows:

(1) Citizens United is a non-profit organization with members throughout the United States, including Arkansas. Citizens United has played a crucial role in providing the public with information regarding the Whitewater scandal. For example, witness David Hale first spoke out in public about alleged misconduct involving Defendant James B. McDougal and President Clinton during a Citizens United radio talk show interview conducted by its chairman, Floyd G. Brown, on or about November 5, 1993. Citizens United seeks access to Mr. Clinton's videotaped testimony on its own behalf, on behalf of its members and supporters and on behalf of the American public.

(2) In response to Defendant James B. McDougal's motion to compel the personal appearance of William J. Clinton, President of the United States, as a witness in the instant proceeding, this Court entered an Order on March 20, 1996 directing that Mr. Clinton's testimony be taken by videotape.

(3) Mr. Clinton's videotaped testimony was taken from the White House on April 28, 1996 with this Court presiding via a scrambled satellite link.

(4) On May 6, 1996, the Court entered an Order directing the parties to file briefs "articulating their positions with regard to the handling and release of the videotape by May 24, 1996."

(5) In recent weeks, the White House has issued public statements objecting to the release of copies of Mr. Clinton's videotaped testimony. According to these statements, Mr. Clinton seeks to prevent his critics, personified as Citizens United Chairman Floyd G. Brown, from disseminating and broadcasting edited versions of his testimony, because Mr. Clinton believes such dissemination and broadcast would be detrimental to his public image. See Appendix to attached brief.

(6) Citizens United believes that Mr. Clinton's political concerns furnish no basis for denying the public access to his videotaped testimony. Quite to the contrary, release of the videotape will further the public interest by providing the public with an opportunity to see and hear Mr. Clinton's testimony, to learn the truth first hand, and to evaluate the truthfulness of his testimony.

(7) Citizens United further believes that by delaying release until the conclusion of the trial, the defendants' right to a fair trial will be fully preserved.

PRAYER FOR RELIEF

For the reasons set forth herein, and in the accompanying Declaration of Floyd G. Brown and Brief of Citizens United, Applicant prays that this Honorable Court:

(1) enter an Order granting Applicant leave to seek release of Mr. Clinton's videotaped testimony in the instant case;

(2) enter an Order directing the Clerk to release one unedited copy of the aforementioned videotape to Citizens United. and make available to the public as many copies of the videotape as the Court deems appropriate;

(3) and provide such other and further relief as the (:our ~ deems appropriate.

Respectfully Submitted,
Citizens United, By Counsel

DECLARATION OF FLOYD G. BROWN

1. I am Floyd G. Brown, President and Chairman of the Board of Citizens United. Except as otherwise noted, I have personal knowledge of the matters stated herein.

2. Citizens United is a nonprofit organization with members throughout the United States, including Arkansas. Citizens United has played a crucial role in providing the public with information on matters bearing on the integrity of public officials, including Whitewater. For example, witness David Hale first spoke out in public about alleged misconduct involving Defendant James B. McDougal and President Clinton during a Citizens United radio talk show interview conducted by me, on or about November 5, 1993.

3. Citizens United seeks to copy, disseminate and broadcast portions of Mr. Clinton's videotaped testimony in the instant case, in order to help educate and inform the public about an important event bearing on the integrity of public officials.

I declare, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge.

Dated 5/10/96 /s/ Floyd G. Brown

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. No. LR-CR-95-173

JAMES B. MCDOUGAL,
JIM GUY TUCKER, AND
SUSAN MCDOUGAL,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER ON VIDEOTAPE OF PRESIDENT CLINTON'S DEPOSITION

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[page 13] all other testimony provided in court, which can be taped, but not publicly distributed. The additional request of the news media is not supported by precedent, and the constitutional interests of the press and public in access to the President's testimony have been fully protected by permitting their attendance in court when the videotape was played for the jury, and by providing them immediate access to transcripts of his testimony.

Moreover, there is a crucial concern that strongly militates against finding a common-law right to make copies of the videotape. If copies of the videotape of the President's testimony were made available to the public, the tape would be subject to selective editing, out-of-context replays and similar misuse, as well as commercial and political exploitation. See Warner Communications, 435 U.S. at 601 (if media obtain copies of tapes, there would be no "safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of [the] tape[]").

For this reason, the Supreme Court in Warner Communications noted that "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." 435 U.S. at 598. The Court recognized that the common-law right of access has been denied where necessary to ensure that court records "are not 'used to gratify private spite or promote public scandal' with no corresponding assurance of public gain." Id. at 603.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. LR-CR-95-173
	)	
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN MCDOUGAL,	)	
Defendants.	)	

MEMORANDUM OF THE PRESIDENT
IN HIS PERSONAL CAPACITY
IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Undersigned counsel, on behalf of the President of the United States in his personal capacity, respectfully submit this memorandum in opposition to the applications of Reporters Committee for Freedom of the Press, et al., and Citizens United (collectively "applicants") for permission to copy and disseminate the videotaped trial testimony of President William Jefferson Clinton. We adopt the arguments contained in the memorandum of the Department of Justice in support of its motion for a protective order governing copying and dissemination of the President's videotaped trial testimony and write separately simply to emphasize the following points.

* * *

[page 3] whether access is warranted in an individual case. Nixon, 435 U.S. at 599. The Eighth Circuit has taken a neutral approach to this balancing inquiry and has expressly rejected the approach of those courts that apply a "strong presumption in favor of access." Webbe, 791 F.2d at 106. In this case, public copying and broadcast is not warranted. The case for such copying is weak because the public has already had access to all

the information contained in the tape, by viewing the tape in open court as it was played for the jury and by reading the written transcript. On the other hand, the case against copying and broadcast of this videotape is substantial because of the dangers of misuse of the President's testimony.

The common law right of access is not an invitation or license to abuse a court's processes. Accordingly, a district court should not grant access to a document which will likely be used "to gratify private spite or promote public scandal." Nixon, 435 U.S. at 603 (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893)). In this case, as in Nixon, if applicants and others are permitted to copy and disseminate the videotape, the President's testimony will inevitably be distorted and used for improper purposes.

The President's political opponents have already declared their intention to use portions of this videotape (necessarily taken out of context) in political "attack ads."[2] **[page 4]** If the tape were released, there would of course be no "safeguard, other than the taste of the marketing medium against distortion through cutting, erasing, and splicing of tapes." Nixon, 435 U.S. at 601. Moreover, if this tape is released to the public, there is a strong likelihood that it (or portions of it) will be used in the marketplace for the [sic] commercial gain, whether by the applicants or others. As the Supreme Court indicated in Nixon, the common law right of access should not be a tool for unscrupulous marketers to line their pockets — particularly by distorting public documents. Id. at 601-03.

In sum, if the President's videotaped testimony is released for copying, it will be distorted for partisan purposes and exploited for commercial gain. These activities would constitute an abuse of this Court's processes. Allowing such abuses to occur is completely unnecessary in this case because the public

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[2] See, e.g., the application of Citizens United and T. 3725-3740: res ipsa loquitur.

has already had access to the courtroom when the tape was played, and transcripts of the testimony have been released.

For the foregoing reasons, and for the reasons expressed in the memorandum of the Department of Justice, counsel for the President respectfully request that this Court enter a protective order denying copying of the videotape of the President's trial testimony.

Nos. 96-2606, 96-2671

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES B. MCDOUGAL; JIM GUY TUCKER;
SUSAN MCDOUGAL,
Defendants-Appellees.

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, et al.,
Movants-Appellants.

DOW JONES AND COMPANY, INC.,
Movant.

WILLIAM JEFFERSON CLINTON
The President of the United States in his official capacity,
Interested Party-Appellee

CITIZENS UNITED,
Interested Party-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR APPELLEE PRESIDENT
OF THE UNITED STATES IN HIS OFFICIAL CAPACITY

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* * * *

[page 8] STANDARD OF REVIEW

The district court's First Amendment ruling is subject to *de novo* review. See *United States* v. *Webbe*, 791 F.2d 103, 105 (8th Cir. 1986). The district court's rejection of the common law claim is reviewed for abuse of discretion. *See id.* at 106-07.

ARGUMENT[8]

Indisputably, the public and the press have a right of access to criminal proceedings. *See, e.g., Press-Enterprise Co.* v. *Superior Ct. of Cal.*, 478 U.S. 1, 8-9 (1986). Indeed, the Attorney General fully supports such access, and has provided in Department of Justice policy — which governs the Independent Counsel — that criminal proceedings should be conducted publicly whenever possible. See 28 C.F.R. § 50.9.

This appeal, however, is not about access to the criminal proceedings below, or even to the President's testimony. There already has been public and media access to that testimony: the videotape was played in open court, and transcripts were made available at once. The public and the press thus were afforded exactly the same access they would have received if the President

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[8] We do not contest Citizens United's standing to sue. The district court held that Citizens United lacked standing because it was neither a party to the criminal proceeding nor a member of the news media. App. 313 n.2. Even assuming that Citizens United should be treated as a member of the general public rather than a member of the news media (but see Citizens United Br. 1517), the public has the same right of access to judicial proceedings and records as the news media. *See Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 609 (1978). Thus, if the news organizations have standing to raise their First Amendment and common law claims, we believe that Citizens United should be permitted to raise its similar claims.

* * *

[page 28] in fact have been) audiotaped, but cannot be publicly distributed. As the district court recognized, according different treatment to the President's videotaped testimony, by permitting public dissemination, "might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties." App. 319. *See also In re Application of American Broadcasting Companies*, 537 F. Supp. at 1171-72 n.10 (recognizing that release of copies of a videotaped deposition would, for such reasons, discourage witnesses from agreeing to such depositions, thereby "imped[ing] the utilization at trial of a practical instrument of modern technology").

If copies of the videotape of the President's testimony were made available to the public, the tape would be subject to selective editing, out-of-context replays and similar misuse, as well as commercial and political exploitation.[15] Reporters Committee (Br. 13-14) and Citizens United (Br. 25-28) contend that it is inappropriate to consider the possible misuse of the tape — which consists of trial testimony — in evaluating their common law claims. But the Supreme Court in *Warner Communications* explained that "[e]very court has supervisory power over its own records and files, and access has been denied where court **[page 29]** files might have become a vehicle for improper purposes." 435 U.S. at 598. The Court recognized that the common law right of access has been denied where necessary to ensure that court records are not "'used to gratify private spite or promote public scandal' with no corresponding

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[15] Indeed, Citizens United itself appended to its district court brief the contents of a newspaper article quoting its chairman, Floyd G. Brown, as stating that the videotape is "'legitimate for campaign use.'" Appendix to Brief of Applicant Citizens United Urging Release of the Videotaped Testimony of President William J. Clinton Upon Completion of the Trial at A-3 (filed May 13, 1996).

assurance of public benefit." *Id.* at 603 (citation omitted). *See also id.* at 598. And the Court indicated that it is appropriate to consider whether there exists "any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes" before they are released to the public. 435 U.S. at 601. Although the Supreme Court had no occasion to determine the precise weight to be accorded these concerns, they were clearly viewed as relevant to the common law analysis. *See Warner Communications*, 435 U. S. at 602.[16]

Both Reporters Committee (Br. 20) and Citizens United (Br. 25-26) rely on *In re Application of National Broadcasting Co., Inc.*, 653 F.2d 609 (D.C. Cir. 1981), in support of their argument that the possible misuse of the tape is an invalid consideration. But this Court has expressly declined to follow that case in light of the D.C. Circuit's reliance on a strong presumption in favor of access. *See Webbe*, 791 F. 2d at 105, 106. *Accord Belo Broadcasting*, 554 F. 2d at 433-34.

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[16] The Court in *Warner Communications* resolved that case on the basis of a unique statute, the Presidential Recordings Act, which made it unnecessary to engage in a particularized balancing of the factors that it had identified as relevant. *See* 435 U.S. at 603-06.

No. 96-2606

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE APPLICATION OF REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, et al.,

Appellants.

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JAMES B. McDOUGAL, JIM GUY TUCKER,
and SUSAN H. McDOUGAL

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF OF THE PRESIDENT OF THE UNITED STATES IN HIS PERSONAL CAPACITY IN SUPPORT OF APPELLEES

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[page 13] obtaining a President's testimony while minimizing the intrusion on his duties." Id.

Third, the court considered "the unique circumstances of this case and the manner in which the depositions of President Ford and Carter were handled. In each of those instances, the district court proscribed public access to the tape." Id. at 8-9 (citing United States v. Fromme, CR-S-75-451 (E.D. Cal. 1975), and United States v. Kidd, Crim. No. 78-9-Mac. (M.D. Ga. 1978)). The district court thus followed a consistent and long-standing practice that when sitting Presidents testify by videotape in criminal trials, those videotapes should not be released to the press or public for copying and broadcast.[3]

Fourth, the district court found that there was reason for concern about "the potential for misuse of the tape." Order [page 14] at 9.[4] Although the court stated its belief that the press did

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[3] Appellants rely on United States v. Poindexter, 732 F. Supp. 170 (D.D.C. 1990), to support their claim that Presidential testimony should be released for copying. The Poindexter opinion does not identify the standard the court used to evaluate the media's application for access, but the result appears inconsistent with settled law. In particular, although the Poindexter court cited the Fromme precedent, 732 F. Supp. at 173 n.5, it did not explain why it chose to reject the consistent practice of sealing videotaped Presidential testimony. Moreover, even if the decision in Poindexter were correct, it is distinguishable from this case because the deposition of President Reagan occurred after he had left office. Accordingly, concerns about partisan misuse and distortion of the tape were not presented in that situation. In addition, because Mr. Reagan had become a private citizen, Poindexter did not present the court with the same delicate task of accommodating a coordinate branch of government, and of ensuring that the testimony not interfere with the President's duties.

[4] Indeed, prior to the district court's decision there had been considerable publicity about the likelihood that portions of the videotape might be used in partisan "attack ads." See, e.g., Rowley, Clinton Deposition Has Critics Pondering Potential TV Ads,

not seek the tape for "improper motives," it recognized that,

> once released and rebroadcast, the press cannot maintain control over individuals who might copy the broadcast and edit it to suit their purposes. The Supreme Court in Warner Communications recognized the potential for abuse if the Nixon tapes were released. "Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes." 435 U.S. at 601.

Id.

The district court was properly concerned with the danger of misuse of the tape. In Nixon, the Supreme Court warned that a lower court should not allow itself to be used as the instrument for distortions.[5] It emphasized —

> the crucial fact that respondents require a court's cooperation in furthering their commercial plans. The court — as custodian of tapes obtained by subpoena over the opposition of a sitting President, solely to satisfy "fundamental demands of due process of law in the fair administration of criminal justice" — has a

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Associated Press (April 1, 1996); Means, Clinton Whitewater Testimony: Attack Ad a Double-Edged Sword, Orlando Sentinel (April 3, 1996); Whitewater Witness: Clinton Testifies in Bank Fraud Trial of His Former Business Partners, Minneapolis Star Tribune (April 29, 1996); Clinton Testifies from White House: Answers Questions About Whitewater, St. Louis Post-Dispatch, (April 29, 1996).

[5] Considering the profound advances in videographic technology — particularly the advent of computer-assisted editing capabilities — see Gruber, Nicholson & Reichek, Video Technology, 58 Am. Jur. Trials § 64 at 588-89 (1996) — the admonitions about manipulation and distortion made 18 years ago in Nixon apply with even greater force today.

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No. 96-1788

In The

Supreme Court of the United States

October Term, 1996

CITIZENS UNITED,

Petitioner,

v.

UNITED STATES OF AMERICA, WILLIAM JEFFERSON CLINTON, JAMES McDOUGAL, JIM GUY TUCKER, SUSAN McDOUGAL, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, and DOW JONES COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR THE PRESIDENT OF THE UNITED STATES IN HIS PERSONAL CAPACITY

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19 pp

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in declining to permit the public to duplicate the videotaped deposition of President Clinton after playing the videotape in a courtroom full to capacity, releasing the transcript of the deposition testimony, and offering to replay the videotape for persons unable to view the videotape at the trial.

2. Whether the First Amendment compels a trial court to permit duplication of videotaped trial testimony even though neither the public nor the press has ever had physical access to the videotape.

PARTIES TO THE PROCEEDINGS BELOW

During the course of the proceedings, President Clinton has appeared, through separate counsel, in his official capacity and in his personal capacity. Although named in the caption as Respondents, James McDougal, Jim Guy Tucker, Susan McDougal and Dow Jones Company, Inc., took no part in the appeal to the Court of Appeals for the Eighth Circuit.

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 103 F.3d 651 (8th Cir. 1996); the August 12, 1996, order of the Court of Appeals (Pet. App. 20a), which preceded issuance of the opinion, is reported at 92 F.3d 701 (8th Cir. 1996). The opinion and order of the United States District Court for the Eastern District of Arkansas (Pet. App. 24a) are reported at 940 F. Supp. 224 (E.D. Ark. 1996). The order denying Citizens United's suggestion for rehearing en banc and denying its petition for rehearing by the panel (Pet. App. 35a) is unreported.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Rule 53 of the Federal Rules of Criminal Procedure provides:

> The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted.

Local Rule F-5 of the United States District Court for the Eastern and Western Districts of Arkansas provides:

> PHOTOGRAPHING, BROADCASTING, TELEVISING, AND RECORDING IN COURTROOM AND ENVIRONS
>
> (a) The taking of photographs, the recording by any means other than the official court reporter or the radio or television broadcasting (or making of audio or video tapes) in any courtroom or its environs, utilized by either United States District Court in Arkansas during the progress or in connection with any judicial proceedings, including proceedings before a United States Magistrate Judge, is PROHIBITED, except as hereinafter provided, and regardless whether such hearing or proceeding takes place on public or private property or in the office or chambers of a judge or magistrate judge or otherwise.
>
> (b) The taking of photographs, still or motion pictures, and audio and video tapes, of ceremonies and interviews, including administration of oaths of applicants for citizenship and to executive and judicial officers, may be permitted with leave of the Court or the officer in charge thereof; provided that the ceremonies and interviews are not connected with any judicial proceedings. "Judicial proceedings" as used herein, shall include all judicial proceedings, whether civil or criminal, and whether pending, on appeal, or terminated.
>
> (c) "Environs", as used in this Rule, shall include the part of any federal building

with the District set apart for the United States District Court and its facilities, including chambers of the Court, other facilities of court officials and adjacent hallways.

(d) Exception for Media Representatives to make Audio Tapes. Duly identified and authorized representatives of the print, radio, and television media may unobtrusively make audiotapes during trials and hearings in open court solely for the purpose of assuring the accuracy of reports. The only official record of such proceedings shall continue to be that made by the official court reporter and the Clerk in accordance with law. Proper prior arrangements for the making of such audiotape recordings shall be made where necessary to avoid any interruption or interference with such proceedings. Audiotape recordings made pursuant to this exception may not be broadcast or rebroadcast to the public, transferred or sold, or used as such for commercial purposes.

STATEMENT OF THE CASE

The President of the United States, in his personal capacity, adopts and incorporates herein by reference the statement of facts set forth in the Brief in Opposition for the President of the United States in his Official Capacity.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Overview

Citizens United's request for review is both factually unfounded and legally unjustified. Petitioner frames its "central Constitutional issue" as whether "the public can be forever denied access" to the President's videotaped deposition testimony." (Pet. 12). Yet this is *not* a case in which the public has been "forever denied access." The public was permitted to attend the entire criminal trial, where "the videotape was played in open court, to a courtroom full to capacity." (Pet. App. 28a-29a). The district court made transcripts of the testimony "available to the public immediately and a number of newspapers printed the deposition in its entirety." (Pet. App. 29a). Moreover, the district court has an offer outstanding to replay the videotape for "members of the public who were unable to view the videotape at the trial." (Pet. App. 5a n.5). In short, the factual premise for Citizens United's petition – the alleged denial of access – is wholly absent.

Even if the factual predicate *were* present, the legal basis is nonexistent. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-10 (1978), this Court addressed and rejected the constitutional claim that Citizens United seeks to relitigate here. Further review is unwarranted.

One other irrefutable fact further underscores the inappropriateness of this case for review here: while Citizens United contends that the lower courts' decisions herald an inter-circuit conflict over the status of a videotape deposition as a "judicial record," both courts below assumed *arguendo* that the videotape *was* a "judicial record" subject to the common-law right of public access. (Pet. App. 14a, and 31a). The district court then employed

the well-established balancing analysis recognized by this Court in *Nixon*, 435 U.S. at 599, for resolving issues of access to judicial records. The court of appeals found no abuse of discretion. (Pet. App. 15a-17a). Thus, while Citizens United might wish to quibble with the *result* of the district court's exercise of discretion, since the outcome below did not turn on whether the videotape is or is not a "judicial record," the alleged "conflict" presents no issue deserving of this Court's review.[1]

II. Under *Nixon*, It Is Settled That Petitioner Had No First Amendment Right To Duplicate The Videotape.

Citizens United argues that review is necessary to vindicate "important First Amendment principles protecting speech and political debate." (Pet. 12). Petitioner asserts that the rulings below "effectively undercut this Court's established and profound commitment to uninhibited, robust, and wide-open debate on important political and public policy matters." (Pet. 14).

But this Court resolved this issue in *Nixon*. There, various media organizations had sought permission to duplicate and broadcast portions of audiotapes of politically charged White House conversations by defendants

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[1] As Justice Stevens pointed out in his dissenting opinion in *Nixon*, "The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; and when the District Court and the Court of Appeals have concurred, the burden of justifying review by this Court should be virtually insurmountable." 435 U.S. at 613-15 (Stevens, J., dissenting) (footnotes omitted).

and others that had been introduced in evidence at the trial of President Nixon's advisors. 435 U.S. at 594. This Court *rejected* the argument that, insofar as the tapes had been played in open court and made exhibits,[2] the press possessed a constitutional right to copy and publish them. *Id.* at 609.[3] In undertaking its First Amendment analysis, the Court drew a critical distinction between tapes to which the public has already been given physical access and those "to which the public has never had *physical* access." *Id.* Because written transcripts were made available to the public and because the "contents of the tapes were given wide publicity by all elements of the media," the Court held that the press had "no right to information about a trial superior to that of the general public," *id.* at 609, and therefore had no First Amendment right to duplicate the tapes.[4]

This holding is precisely applicable to Citizens United's claims. Citizens United has never claimed to possess a First Amendment "right to information about a trial superior to that of the general public" *or* the press.

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[2] In *Nixon*, the tapes were not only played for the jury; they were also actually entered into evidence. 435 U.S. at 594. In this case, although the transcript of the deposition was admitted into evidence, the videotape itself was not admitted. (Pet. App. 12a).

[3] *See also* 435 U.S. at 608 ("Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion.").

[4] This Court in *Nixon* likewise rejected any suggestion that the Sixth Amendment guarantee of a public trial somehow requires that any part of a trial "be broadcast live or on tape to the public." 435 U.S. at 610.

Nor has it ever suggested that the public has ever had *physical* access to the videotape that Citizens United seeks to duplicate. Consequently, its "central Constitutional issue" is not worthy of further review.

III. Since The Lower Courts' Rulings Assumed Arguendo That The Videotape Was A Judicial Record, There Is No "Conflict" To Be Resolved.

Citizens United argues alternatively that review is necessary to resolve a conflict among the federal circuits. It contends that the court below strayed from the rulings of other circuits in holding that a videotape deposition is not a "judicial record." (Pet. 14). But neither the district court nor the court of appeals based its holding solely on a determination that the videotape was not a "judicial record." For example, the district court specifically avoided the issue, stating:

> The Court need not decide at this time whether the common law right of access applies to videotaped testimony because even assuming it does, the Court finds, on balancing all the relevant factors, that the press' request to copy the videotape must be denied.

(Pet. App. 31a). The district court then articulated at length how it weighed the relevant factors "in light of the relevant facts and circumstances," *see Nixon*, 435 U.S. at 599, of this case. (Pet. 31a-33a).

Similarly, while the Eighth Circuit concluded that *this* videotape was not a "judicial record," its decision did not rest upon the conclusion that *no* videotape could ever be deemed to be a judicial record. More importantly, for purposes of deciding *this* case, the court of appeals

"assume[d] that the videotape is a judicial record subject to the common-law right of public access. . . . " (Pet. App. 14a). The Eighth Circuit heeded this Court's admonition in *Nixon* that "the decision as to access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (Pet. App. 15a) (*quoting Nixon*, 435 U.S. at 599). After carefully reviewing the district court's findings and analysis and considering the arguments advanced by petitioner and the other appellants, the Eighth Circuit found no abuse of discretion and, in fact, observed that the record revealed additional compelling considerations justifying the district court's decision to bar duplication of the videotape. (Pet. App. 16a-17a). In short, the decision below did not rest on the ruling alleged to present a conflict within the circuits.

Citizens United also contends (Pet. 16-17) that the Eighth Circuit's opinion conflicts with decisions of other circuits over the strength of the presumption favoring access. These cases are plainly distinguishable because each involved questions of access once the tapes themselves had been admitted into evidence.[5] In this case, the President's testimony was played, but the videotape itself was never admitted into evidence and therefore did not become a part of the record. More importantly, with one

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[5] *See United States v. Guzzino*, 766 F.2d 302, 303 (7th Cir. 1985); *In re National Broadcasting Co., Inc.*, 653 F.2d 609, 610 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 816 (3d Cir. 1981); *Application of National Broadcasting Co. (Myers)*, 635 F.2d 945, 948-49 (2d Cir. 1980); *Application of CBS (Salerno)*, 828 F.2d 958, 960 (2d Cir. 1987); *United States v. Martin*, 746 F.2d 964, 966 (3d Cir. 1984).

exception,[6] each of the cases relied upon involved access to substantive evidence – tapes that captured the primary conduct of the parties or witnesses – rather than mere testimony.[7] Finally, unlike the decisions below none of the cases upon which Petitioner relies gave the necessary weight to the federal and local rules prohibiting the recording and rebroadcasting of court testimony. See Fed. R. Crim. P. 53 and Local Rule F-5. (Pet. App. 32a, 13a and *supra* pp. 1-2). These distinctions, standing alone, make this case a poor candidate for sorting out any perceived inter-circuit conflict.

IV. Neither Court Based Its Decision On The Potential Political Use Of The Videotape.

As Citizens United frames the issue, the "overriding reason for denying access to the videotape in this case was speculation that the President's political opponents

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[6] That case, *Application of CBS (Salerno)*, 828 F.2d 958, 960 (2d Cir. 1987), is distinguishable because the actual tape was admitted into evidence. The court's rationale for permitting duplication rested largely on the notion that the videotape might more accurately convey the witnesses' testimony. This is a factor that the Court specifically considered but found insufficient in *Nixon*. 435 U.S. at 601 & 602.

[7] *See Guzzino*, 766 F.2d at 303 (audiotapes of telephone conversations involving defendant); *Martin*, 746 F.2d at 966 (audiotapes of face-to-face and telephone conversations involving defendant); *In re National Broadcasting Co., Inc.*, 653 F.2d at 611 (videotapes and audiotapes of conversations involving defendants); *Criden*, 648 F.2d at 303 (audiotapes of telephone conversations involving defendant); *Application of National Broadcasting Co., Inc.*, 635 F.2d at 947 (audio and videotapes involving defendant accepting bribes).

would 'misuse' the videotape." (Pet. 20). The opinions say nothing of the kind. First, if *any* of the district court's reasons could be construed as "overriding" it was that "substantial access" – a factor specifically sanctioned in *Nixon*, 435 U.S. at 600 n.11 – had already been given to the public. (Pet. App. 31a). Second, while the last factor the district court cited was "the potential for misuse," (Pet. App. 32a-33a) it weighed four other considerations against what it acknowledged as the public's "strong interest" in duplicating the videotape.[8] The clear tenor of the district court's concern over "misuse" focused on the evils of marketing, another factor that this Court had specifically legitimized in *Nixon*. *See id.* (*quoting* 435 U.S. at 601). Likewise, nothing in the Eighth Circuit's opinion

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[8] The court first noted that "substantial access" had already been accorded the public. (Pet. App. 31a). Second, the district court found no justification to treat the President's videotaped testimony differently from that of other testimony, particularly in light of Rule 53 of the Federal Rules of Criminal Procedure and the district court's own "Local Rule F-5" which "would have prohibited photographing any of the testimony." (Pet. App. 32a). The district court also noted that releasing the videotape for duplication not only "would contravene the Court's concern with accommodating the interests of the Presidency and might impede any future attempts" to obtain a President's testimony, but would also be inconsistent with the manner in which the videotaped depositions of Presidents Ford and Carter had been handled in other cases. (Pet. App. 32a and n.9). Finally, the district court considered the criminal defendants' argument that release of the videotape could negatively impact them in any future trial, but ultimately gave this consideration little weight. (Pet. App. 33a n.10).

suggests that it considered whether the "President's political opponents" might use the videotape.[9]

V. Petitioner Lacks A Procedural Or Substantive Basis To Claim An Entitlement To Attend The Videotaping Of The Deposition.

Citizens United also argues (Pet. 22) that review would be appropriate "to resolve confusion" over whether the public had a right to attend the actual filming of the deposition. This argument fails both for procedural and substantive reasons. Procedurally, Citizens United should not be heard to complain about the public's exclusion from the actual videotaping because it did not move the District Court for authorization to attend the deposition, much less obtain a ruling from the District Court on that issue.[10] Thus, any argument about the public's right to attend the deposition has been waived.

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[9] While concern for the political misuse of a videotape might provide a legitimate consideration, *see, e.g., Inhofe v. Wiseman*, 772 P.2d 389 (Okla. 1989), the text of the district court and appellate court opinions below provides no basis for inferring that either court was motivated by such a consideration. Indeed, the *only* mention of political misuse appears in the court of appeals' recapitulation of arguments *Citizens United* made in its brief. (Pet. App. 9a-10a). Thus, the "evil" petitioner alleges in part IIC of its petition lacks any basis in fact in the record below, and any review of that issue should await a case in which the issue is actually extant.

[10] Citizens United first entered the case on May 13, 1996, (Pet. 5, 45a), which was roughly two weeks after the deposition was taken, (Pet. 4) and four days after the videotape had been played in open court. (Pet. 4, 27a).

As a substantive matter, the argument is equally flawed. Depositions historically have not been open to the general public. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396-97 (1979) (Burger, C.J., concurring). And where, as here, a deposition is taken for subsequent use at trial, opening the deposition to the public creates numerous problems, such as endangering the ability of a defendant to receive a fair trial, *see id.*, at 378 (majority opinion), and preventing the court from effectively sequestering witnesses. *See* Fed. R. Evid 615. In any event, the public's right to view and hear witness testimony was completely vindicate by the playing of the videotape at trial and the dissemination of the transcript immediately thereafter.[11] *See Nixon*, 435 U.S. at 609 and Pet. App. 28a-29a.

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[11] Although Citizens United argues (Pet. 22) that merely making the transcript available does not satisfy the public right to attend proceedings, that was not the extent of the public's access in this case. The public *was* permitted to attend the trial wherein the tape was played, and the district court has offered to replay the tape for members of the public who wish to view it. (Pet. App. 5a n.5). If the "problem" is that members of the public wish to see the videotape, the "solution" should be to let them see it, as the district court has clearly offered to do. *Id.* Mandating that the district court treat the President's testimony, or any Rule 15 deposition unlike any other testimony presented in its courtroom would force the district court to violate the principles in its own rule prohibiting taping and broadcast of trial testimony. See Local Rule F-5 and Fed. R. Crim. P. 53. It would also contradict the principles confirmed in *Nixon* that "every court has supervisory power over its own records and files." 435 U.S. at 598, and that "the decision as to access is best left to the sound discretion of the trial court. . . . " *Id.* at 599.

VI. No Compelling Reason Exists To Address Petitioner's Standing Argument.

Finally, petitioner claims (Pet. 24-25) that certiorari should be granted in order to establish the principle that it had standing to seek access to the videotape. Because the court below permitted Citizens United to participate and considered Citizens United's substantive arguments, *see* Pet. App. 8a n.9 and 19a, no basis exists for addressing the standing issue at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted:

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In the Supreme Court of the United States

OCTOBER TERM, 1996

CITIZENS UNITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR THE PRESIDENT OF THE UNITED STATES IN HIS OFFICIAL CAPACITY

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QUESTION PRESENTED

Whether petitioner has a First Amendment or common law right to obtain a copy of a videotape of testimony given by the President of the United States in a criminal trial where the media and the public were permitted to view the testimony at the trial and have been provided a transcript of the testimony.

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BRIEF IN OPPOSITION FOR THE PRESIDENT OF THE UNITED STATES IN HIS OFFICIAL CAPACITY

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-19a, 20a-23a) are reported at 103 F.3d 651 and 92 F.3d 701. The opinion of the district court (Pet. App. 24a-34a) is reported at 940 F. Supp. 224.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1996. A petition for rehearing was denied on February 10, 1997. Pet. App. 35a. The petition for a writ of certiorari was filed on May 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This matter arises out of a federal criminal prosecution brought by Independent Counsel Kenneth W. Starr against then-Governor of Arkansas Jim Guy Tucker and two other defendants, James McDougal and Susan McDougal. The defendants were charged with multiple counts of criminal conspiracy and fraud relating to real estate transactions in Arkansas during the mid-1980s. See C.A. App. 1-48 (indictment).

In February 1996, the McDougals moved to compel the personal attendance of the President of the United States to give testimony in the defense case at trial. The Department of Justice, representing the President in his official capacity, filed an opposition to that motion. C.A. App. 49-63. The Department noted that Presidents have traditionally been permitted to provide testimony by answering interrogatories or submitting to a deposition instead of appearing at trial. *Id.* at 53-57.[1] Accordingly, the

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[1] See *Clinton* v. *Jones*, No. 95-1853 (May 27, 1997), slip op. 9 n.14 ("Although Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, * * * no sitting President has ever testified, or been ordered to testify, in open court"); *id.* at 23 (reviewing history of presidential testimony); *United States* v. *Ehrlichman*, 546 F.2d 910, 932-933 (D.C. Cir. 1976) (affirming decision to permit then-President Nixon to answer interrogatories drafted by district court rather than present live testimony at criminal trial), cert. denied, 429 U.S. 1120 (1977); *United States* v. *Poindexter*, 732 F. Supp. 142, 144-146, 157-159 (D.D.C. 1990) (reviewing history of presidential testimony and authorizing videotaped deposition of former President Reagan); *United States* v. *Kidd*, Crim. No. 78-9-Mac. (M.D. Ga.) (order of April 11, 1978) (authorizing videotaped deposition of then-President Carter and further providing that copies of the videotape "shall not be furnished to anyone other than

Department proposed that the President provide testimony through a videotaped deposition, consistent with Rule 15(a) of the Federal Rules of Criminal Procedure, which would then be played in open court. C.A. App. 57.

In light of the unique concerns presented when a sitting President is requested to provide testimony, the district court approved the use of a videotaped deposition. Pet. App. 38a-42a. The court explained that requiring the President to travel to Arkansas to testify in person "would be unduly burdensome to the President in the performance of his official duties." *Id.* at 40a. The court directed the parties "to consult on any necessary editing of the videotape prior to its presentation at the trial." *Id.* at 41a. In response to inquiries from the parties and others, the district court subsequently issued an order directing the government, the defendants, and the President to file briefs regarding "the handling and release of the videotape." *Id.* at 44a. Shortly thereafter, the court issued a supplemental order inviting representatives of the news media to file briefs as well. C.A. App. 87.

On April 28, 1996, the President's deposition was conducted at the White House. Pet. App. 4a, 26a. The district court supervised the deposition through a two-way satellite television connection. *Id.* at 26a. By order of the district court, the proceeding was not open to the press or the public. *Id.* at 43a.

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the court"); *United States* v. *Fromme*, 405 F. Supp. 578, 581-583 (E.D. Cal. 1975) (authorizing videotaped deposition of then-President Ford "[i]n recognition of the high office of the President and being mindful of the inconvenience and burden the subpoena will impose upon him").

Before the videotape had been shown to the jury, Reporters Committee for Freedom of the Press and a number of other news organizations (collectively Reporters Committee) filed an application for "immediate access to the videotape * * * so that it may be copied and disseminated through newscasts." C.A. App. 90. Alternatively, Reporters Committee asked to "view the videotape immediately and * * * copy the videotape at the time it is shown to the jury in open court." *Ibid.* Reporters Committee based its claim both on the First Amendment and on the common law right of access to judicial records. *Ibid.*

The district court directed the parties to respond to Reporters Committee's application in conjunction with their responses to the court's prior briefing order. C.A. App. 111. Reporters Committee sought reconsideration of that order and immediate access to the videotape. *Id.* at 112. The district court denied that request, noting that it had established a briefing schedule "to permit all interested parties a reasonable time to express their positions" regarding access to the videotape. *Id.* at 116.

On May 9, 1996, an edited version of the videotape of the President's testimony was shown to the jury in open court. The tape had been edited by agreement of the Office of the Independent Counsel and counsel for the criminal trial defendants "to delete certain portions that generally contained objections and argument of counsel." Pet. App. 27a & n.5. A written transcript of the deposition reflecting those deletions was made part of the record. *Ibid.*

The President's testimony was observed by members of the public and the press attending the trial, and has since been widely reported in the news media. A stenographic transcript of the President's testi-

mony was made publicly available by the district court immediately after the tape was shown in court, and was reprinted by a number of newspapers. See Pet. App. 29a. (The transcript is reproduced in the appendix filed by Reporters Committee in the court of appeals. See C.A. App. 173-301.)

Petitioner Citizens United subsequently filed an application in the district court requesting release of edited and unedited copies of the videotape upon completion of the trial. See Pet. App. 45a-48a. The Department of Justice, on behalf of the President in his official capacity, filed a motion for a protective order in the district court to prevent release of the videotape. See *id.* at 49a-51a.[2] The defendants also opposed release of the tape. See *id.* at 30a, 33a n.10. The Independent Counsel deferred to the Department of Justice on that issue. See Response of the Office of Independent Counsel to Appellants' Petition for Expedited Review and Appellants' Brief on the Merits at 1, filed in *United States* v. *McDougal*, No. 96-2236 (8th Cir.) (filed May 13, 1996).

2. On June 11, 1996, the district court granted the motion for a protective order. The court explained that "[t]he videotape was played in open court, to a courtroom full to capacity," and that "written copies of the deposition testimony [were made] available to the public immediately after the videotape was played and a number of newspapers printed the deposition in its entirety." Pet. App. 28a-29a. In light of that access, the court concluded, the First Amendment did not confer on the press a right to copy the videotape.

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[2] Dow Jones & Company subsequently filed an application for release of the unedited videotape and unedited transcript of the entire deposition. See Pet. App. 28a.

Id. at 29a-30a (citing *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *United States* v. *Webbe*, 791 F.2d 103, 105 (8th Cir. 1986)).

After "balancing all the relevant factors," the district court also held that Reporters Committee and Dow Jones had no common law right of access to the videotape.[3] The court recognized "the strong interest of the public and the press in access to judicial proceedings and in obtaining important information," Pet. App. 31a, but concluded that several factors weighed against disclosure of the videotape. First, the court noted that "the press * * * attended the trial, reported the events of the trial to the public, and had a transcript of the videotaped deposition available to it." *Ibid.* Second, the court was "not persuaded that access to the videotaped testimony of the President should be treated differently from that of any other witness." *Ibid.* The court explained that if the President had testified in person at trial, Federal Rule of Criminal Procedure 53 and Rule F-5 of the Rules of the United States District Courts for the Eastern and Western Districts of Arkansas "would have prohibited photographing or broadcasting any of the testimony." *Id.* at 32a.[4] The court concluded that "[t]o single the

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[3] The court assumed, without deciding, that the common law right of access to judicial records encompasses videotaped testimony. Pet. App. 31a.

[4] Rule 53 provides that "[t]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." Rule F-5 provides that authorized members of the news media may make "audio tapes during trials and hearings in open court solely for the purpose of assuring the accuracy of reports," but further provides that

[President's] deposition testimony out for special treatment would contravene the Court's concern with accommodating the interests of the Presidency and might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties." *Ibid.*

Third, the court observed that prior courts had declined to order that videotaped depositions given by Presidents Ford and Carter be released to the public. Pet. App. 32a. Finally, the court determined that "the potential for misuse of the tape" was an additional factor weighing against disclosure, noting the absence of "any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of [the] tape[]." *Id.* at 33a (quoting *Warner Communications*, 435 U.S. at 601).[5] Although the court declined to permit the videotape to be copied, it ordered (with the consent of the President and the parties) that the unedited portions of the deposition transcript should be released to the public, "in keeping with [the court's] policy of providing the press with full access to the proceedings." *Ibid.*[6]

"[a]udio tape recordings made pursuant to this exception may not be broadcast or rebroadcast to the public, transferred or sold, or used as such for commercial purposes."

[5] The court also noted that one of the defendants, Jim Guy Tucker, was the subject of another indictment that had not yet proceeded to trial. Pet. App. 33a n.10. The court concluded, however, "that the release of the videotape would have little impact on Tucker's second trial and that this factor does not weigh heavily in favor of not releasing the videotape." *Ibid.*

[6] The district court denied petitioner's application for release of the videotape on independent grounds, holding that the organization lacked standing because it is "not a party to

3. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court first concluded that the videotape of President Clinton's deposition testimony is not a judicial record to which the common law right of access applies. Pet. App. 12a-14a. The court distinguished the videotape at issue in this case from "recordings of the primary conduct of witnesses or parties." *Id.* at 13a. Because "Rule 53 of the Federal Rules of Criminal Procedure prohibits photography or other electronic recording of live witness testimony in the courtroom," the court explained, the effect of its holding was to "mandate[] that Rule 15 deponents are treated equally to witnesses who testify in court, in person." *Ibid.*

b. In the alternative, the court of appeals held that the district court's denial of access to the videotape would not constitute an abuse of discretion even if the videotape were assumed to be a judicial record. Pet. App. 14a-17a. The court of appeals based its conclusion in part on the "sound reasons stated by the district court." *Id.* at 16a. The court observed as well that "courts should avoid becoming the instrumentalities of commercial or other private pursuits"; that "granting access to the videotape of President Clinton's testimony could harm the strong public interest in preserving the availability of material testimony in criminal trials"; and that the district court's decision was consistent with "a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting president."

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this action and is not a news media organization." Pet. App. 26a n.2. We have not contested petitioner's standing to apply for release of the videotape. See *id.* at 59a n.8. The court of appeals did not address that issue. See *id.* at 19a.

Id. at 17a. The court explained that "there has never been compelled in-court live testimony of a former or sitting president, nor has there ever been compelled dissemination of copies of a videotape recording of a sitting president's testimony." *Ibid.*

c. Finally, the court of appeals agreed with the district court that the First Amendment right of access to judicial proceedings does not extend to copying the videotape of the President's testimony. Pet. App. 18a-19a. Because the trial itself was open to the press and public, the court explained, petitioner and Reporters Committee "received all the information to which they were entitled under the First Amendment." *Id.* at 18a.

ARGUMENT

1. Petitioner contends (Pet. 12-13) that review is warranted to address the question whether the First Amendment gives the public the right to obtain a copy of the President's videotaped testimony in a criminal case. He asserts (Pet. 13) that *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978), left that question open. That claim is incorrect. In *Warner Communications*, this Court rejected the contention that the public and press enjoy a First Amendment right to copy tape recordings that are played in open court in criminal trials. The Court explained that

> the press—including reporters of the electronic media—was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public.

Id. at 609. Relying on this Court's analysis in *Warner Communications* (see Pet. App. 18a), the court of appeals in this case correctly concluded that the press and public "received all the information to which they were entitled under the First Amendment." *Ibid.*; see also *id.* at 30a (district court holds that "[t]he First Amendment right of the press is fully satisfied in this instance by allowing the press to attend the videotaped deposition to the jury and in providing full access to the written transcript").

Petitioner errs in suggesting (Pet. 12-13) that *Warner Communications* left the First Amendment question "unanswered" in light of the existence of a comprehensive administrative scheme governing the release of President Nixon's recordings. Although *Warner Communications* relied on the existence of that administrative mechanism in rejecting respondents' claim of a common law right of access to the presidential recordings at issue, see 435 U.S. at 602-608, the Court did not suggest that the existence of that scheme was relevant to the disposition of respondents' *constitutional* claim, see *id.* at 608-610.

Petitioner also contends (Pet. 13) that the district court's refusal to release the videotape violated the First Amendment because it was based on a concern that petitioner "would use the videotape to undermine President Clinton's popularity during the 1996 Presidential campaign." Contrary to petitioner's assertion, neither the court of appeals nor the district court suggested that access was being denied in order to shield the President from political comment or criticism, either from petitioner or from anyone else. Rather, those courts based their holdings in part on the quite different concern that private parties might misuse the tape by selectively editing it to distort the

President's testimony. See Pet. App. 32a ("once released and rebroadcast, the press cannot maintain control over individuals who might copy the broadcast and edit it to suit their purposes"); *id.* at 16a (referring with approval to the district court's conclusion that "there exists a potential for misuse of the tape"). That concern was based directly on this Court's decision in *Warner Communications*, 435 U.S. at 603, which recognized that the courts should avoid "becom[ing] a partner in the use of" tapes in judicial custody " 'to gratify private spite or promote public scandal,' * * * with no corresponding assurance of public benefit."

2. Petitioner also contends (Pet. 14-18) that it is entitled to obtain a copy of the videotape of the President's testimony under the common law right of access to judicial records. The court of appeals correctly concluded that the videotape is not a "judicial record" (Pet. App. 12a-14a) and that, even if it were, the district court did not abuse its discretion in refusing to allow the videotape to be copied. *Id.* at 14a-17a. The court of appeals' rejection of petitioner's common law claim does not warrant this Court's review.

a. Petitioner takes issue (Pet. 14-16) with the court of appeals' threshold determination that the videotape is not a judicial record for purposes of the common law right of access. As the court of appeals explained, however, the videotape at issue in this case is not a recording of a witness's or party's "primary conduct"; instead, it is simply an electronic recording of witness testimony. *Id.* at 13a. Because Rule 53 of the Federal Rules of Criminal Procedure prohibits the recording of witness testimony in the courtroom, the public's access to such testimony is typically

limited to the opportunity to observe the testimony at trial and to obtain a written transcript. The court of appeals' holding therefore places Rule 15 deponents "on [an] equal footing" with witnesses who testify in open court. Pet. App. 14a. That result appropriately preserves the traditional scope of public access to witness testimony.

Unlike the court of appeals in this case, the Second Circuit has held that a videotaped deposition is subject to release under the common law right of access to judicial records. See *In re Application of CBS, Inc.*, 828 F.2d 958, 959-960 (2d Cir. 1987).[7] This case, however, does not provide a suitable vehicle for resolution of that conflict. Both courts below concluded (see Pet. App. 14a, 31a) that petitioner would not be entitled to access to the videotape even if it were determined to be a judicial record. Because that alternative holding provides an independent ground for the decision below, the question whether a videotaped deposition constitutes a judicial record does not warrant further review in this case.[8]

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[7] The Second Circuit recognized that a videotaped deposition conducted pursuant to Rule 15 might be edited to delete extraneous material before being shown to the jury. See 828 F.2d at 960. The court's analysis makes clear, moreover, that the videotape actually played at trial—*i.e.*, the edited videotape —would constitute the "judicial record" to which a common law right of access would attach. See *id.* at 959 ("the common law right to inspect and copy judicial records applies to any item entered into evidence at a public session of a trial") (italics and internal quotation marks omitted). To the extent that petitioner seeks access to the *unedited* videotape (see Pet. App. 47a), the Second Circuit's decision provides no support for its claim.

[8] Petitioner also suggests (Pet. 15-16) that the court of appeals' holding conflicts with decisions of the District of

b. Although the common law affords members of the public a right of access to judicial records, this Court has emphasized that "the right to inspect and copy judicial records is not absolute." *Warner Communications*, 435 U.S. at 598. Requests for access are "left to the sound discretion of the trial court * * * in light of the relevant facts and circumstances of the particular case." *Id.* at 599. The courts below correctly concluded that release of the videotape would be inappropriate even if the videotape were determined to be a judicial record.

The district court identified four factors that weighed against allowing the videotape to be copied and broadcast. First, the court noted that the public and the press had already been given "substantial access" to the President's testimony. The trial at which the videotape was played was open to the press and public, and a verbatim transcript of the deposition was subsequently made available. Pet. App. 31a. Second, the court concluded that release of the videotape would cause the President's testimony to "be treated differently from that of any other witnesses," and would "contravene the * * * concern with accommodating the interests of the Presidency" that underlay the court's original deposition order. *Id.* at 31a, 32a. Third, the district court observed that

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Columbia, Third, and Seventh Circuits. Of the four cases cited by petitioner, however, three—*United States* v. *Guzzino*, 766 F.2d 302, 303 (7th Cir. 1985); *United States* v. *Martin*, 746 F.2d 964, 966 (3d Cir. 1984); *In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981)—involved tapes of primary conduct by parties, a situation that the court of appeals (Pet. App. 13a) expressly distinguished. The other case—*Smith* v. *United States District Court*, 956 F.2d 647, 648 (7th Cir. 1992)—did not involve a tape recording at all.

videotaped testimony given in previous cases by other sitting Presidents had never been ordered to be made available for public copying. *Id.* at 32a. Finally, the court recognized that copies of the tape would be subject to potential "misuse" by persons who could "edit it to suit their purposes," leading to possible "distortion through cutting, erasing, and splicing." *Id.* at 32a-33a (quoting *Warner Communications*, 435 U.S. at 601). The court of appeals found those considerations to be "sound reasons" for declining to permit the videotape to be copied. *Id.* at 16a.

Of those four factors, the only one that petitioner seriously disputes is the final one, the potential for misuse of the videotape. See Pet. 20. As explained above, however, this Court's decision in *Warner Communications* makes clear that the potential for misuse is an appropriate consideration. In discussing the qualified nature of the common law right of access, the Court explained that "access has been denied where court files might have become a vehicle for improper purposes," as where records might be "used to gratify private spite or promote public scandal." 435 U.S. at 598. The Court specifically noted the risk that tape recordings could be distorted through "cutting, erasing, and splicing." *Id.* at 601. It was thus appropriate for the district court and the court of appeals to consider the risk of misuse as one of several factors bearing on the requests to copy the videotape.[9]

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[9] Petitioner contends (Pet. 18) that consideration of potential misuse could preclude the copying of judicial records in all cases, since every judicial record could be used for commercial purposes. But the court of appeals did not hold that a trial court must disallow copying whenever a risk of private exploitation is present; it simply held that the potential for such

Finally, as the court of appeals recognized (Pet. App. 17a), no sitting President has ever been compelled to give live, in-court testimony, and no court has ever directed that a recording of a President's deposition testimony be made available for public copying. That historical record demonstrates "a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting president." *Ibid.* Petitioner makes no attempt to refute the court of appeals' assessment of judicial tradition in this area. Instead, petitioner (Pet. 16-17) invokes decisions of other courts of appeals that have recognized a "strong presumption" in favor of access to judicial records. Petitioner contends (Pet. 17) that those cases demonstrate that "the presumption favoring access is particularly strong when the materials sought relate to the activities of public officials." Those decisions, however, involve video or audio recordings of illicit actions of public officials. See *United States* v. *Martin*, 746 F.2d 964, 966 (3d Cir. 1984); *In re Application of National Broadcasting Co., Inc.*, 653 F.2d 609, 611 (D.C. Cir. 1981); *United States* v. *Criden*, 648 F.2d 814, 815 (3d Cir. 1981); *In re Application of National Broadcasting Co.*, 635 F.2d 945, 947 (2d Cir. 1980). The videotape in this case, by contrast, records deposition testimony given by a sitting President as a witness in a criminal case; the

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exploitation is a legitimate consideration to be weighed in the balance. Petitioner also cites *United States* v. *Guzzino*, 766 F.2d 302 (7th Cir. 1985), for the proposition that concern about commercial misuse is illegitimate. See Pet. 21. In *Guzzino*, however, the tape recordings in question were withheld by the district court not because of concerns about commercial misuse, but rather because of shortcomings in the technical quality of the recordings. See 766 F.2d at 303-304.

tape does not record primary conduct that is at issue in the underlying criminal proceeding.[10]

3. Petitioner also contends (Pet. 23) that the public had a First Amendment right to attend the President's deposition itself, and that the videotape must be made available for copying in order to "vindicate" that right. The decisions on which petitioner relies (see Pet. 22), however, do not support its constitutional claim. Those cases involved courtroom proceedings that have traditionally been open to the public. The Court's First Amendment analysis in that setting emphasized the common law tradition of public attendance at particular stages of a criminal proceeding. See *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 505-508 (1984) (jury selection in criminal case); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603-606 (1982) (criminal trial); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564-580 (1980) (Opinion of Burger, C.J.) (criminal trial). There is, however, no common law tradition of public attendance at pretrial depositions. Cf. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial").[11]

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[10] The judicial tradition of restricting access to recordings of presidential testimony furthers important interests. As the district court recognized (Pet. App. 32a), releasing the videotape at issue here "might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties." *Ibid.*

[11] Petitioner's reliance (see Pet. 23) on *United States* v. *Poindexter*, 732 F. Supp. 165 (D.D.C. 1990), is misplaced. The court in that case *denied* a request by the press to attend a deposition of former President Reagan. Although the court relied in part on the fact that the deposition could involve

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997

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discussion of "sensitive security information" that would be "impractical to screen out in advance" of the deposition, the court also emphasized the qualified nature of the right of access to pretrial proceedings. *Id.* at 167. The court noted that "[i]t could hardly be argued that there is a tradition of public access to the type of pretrial proceeding involved here," and that "there has never been an instance of public testimony by a former President in a pretrial hearing." *Ibid.*

Supreme Court, U.S.
FILED
AUG 20 1997
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No. 96-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITIZENS UNITED,

Petitioner,

v.

UNITED STATES OF AMERICA,
WILLIAM JEFFERSON CLINTON,
JAMES MCDOUGAL, JIM GUY TUCKER,
SUSAN MCDOUGAL,
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, ET AL.,
AND DOW JONES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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9pp

QUESTIONS PRESENTED

1. Whether the lower courts' decisions violated the public's common law right of access to judicial records by refusing to grant members of the public access to a videotaped deposition containing the witness testimony of the President of the United States in a criminal trial, which was taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure, played to the jury in open court, and remains in the custody of the federal trial court?

2. Whether the lower courts' decisions violated the Petitioner's First Amendment rights by basing their refusal to allow Petitioner access to a videotaped deposition constituting a judicial record on the ground that the judicial record might be used to undermine the political popularity of the deponent, the President of the United States?

3. Whether the First Amendment entitles members of the public to receive post-trial access to videotaped deposition testimony, where the public had been barred from attending the court session and the witness' testimony was videotaped for use as a substitute for live testimony at trial?

4. Whether a nonprofit citizens advocacy group, that seeks, for its own use, a copy of the videotaped deposition of the President of the United States as a witness in a criminal trial, has standing to petition the courts for a copy of the videotape?

PARTIES BELOW

The Petitioner, Citizens United, was an Interested Party/Appellant in the court of appeals. Citizens United is a citizens advocacy group organized as a nonprofit social welfare organization, incorporated under the laws of the Commonwealth of Virginia; it does not have any parent companies or subsidiaries.

Respondent, United States of America, was the Plaintiff/Appellee in the court of appeals.

Respondent, William Jefferson Clinton, President of the United States, was an Interested Party/Appellee in the court of appeals.

Respondents, Reporters Committee for Freedom of the Press, Radio-Television News Directors Association, Capitol Cities/American Broadcasting Companies, Cable News Network, Inc., National Broadcasting Company, Inc. and CBS, Inc., were Movants/Appellants in the court of appeals in a related, but separate, case that was heard and decided together with Citizens United's appeal.

Respondents, James B. McDougal, Jim Guy Tucker and Susan McDougal, were Defendants/Appellees in the court of appeals. None of these individuals participated actively in the proceedings before the court of appeals.

Respondent, Dow Jones Company, Inc., was a Movant/Appellee in the district court. It did not participate actively in the proceedings before the court of appeals.

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No. 96-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITIZENS UNITED,

Petitioner,

V.

UNITED STATES OF AMERICA,
WILLIAM JEFFERSON CLINTON,
JAMES MCDOUGAL, JIM GUY TUCKER,
SUSAN MCDOUGAL,
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, ET AL.,
AND DOW JONES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (App. 1a - 19a) are officially reported at 103 F.3d 651 (8th Cir. 1996). The opinion and judgment of the United States District Court for the Eastern District of Arkansas (App. 24a - 34a) are officially reported at 940 F.Supp. 224 (E.D. Ark. 1996).

ARGUMENT

I. THE PRESIDENT IGNORES THE FACTUAL RECORD AND HIS OWN ARGUMENTS BEFORE THE DISTRICT COURT AND COURT OF APPEALS, AND THE TRUE BASIS FOR THEIR RULINGS.

Throughout this entire litigation — at least until now — President Clinton has advocated a position that he now maintains was not a basis for the holding below, despite the fact that the position he advocated clearly was adopted by the District Court and the Court of Appeals. The President, in both his official capacity and his personal capacity, urged the courts below to deny Citizens United access to a copy of his videotaped testimony in the trial of his former Whitewater business partners on the grounds that Citizens United or others would "misuse" the videotape by employing it for partisan political purposes. Now that the case has come before this Court, however, the President seeks to distort the record by claiming the courts below did not base their decision upon "shield[ing] the President from political comment or criticism." (Brf. Op. 10). This representation is disingenuous at best.

The record on this point is crystal clear. The sole factual basis underlying the District Court's conclusion that the videotape might be subjected to distortion or misuse was the President's citation to the affidavit of Citizens United Chairman Floyd G. Brown, wherein Mr. Brown opined that "Citizens United seeks to copy, disseminate and broadcast portions of Mr. Clinton's videotaped testimony...in order to help educate and inform the public about an important event bearing on the integrity of public officials"; and news reports

in which Mr. Brown was reported to have stated that the videotape is "legitimate for campaign use." (*See* App. 53a n.2.) Moreover, in summarizing his opposition to the videotape's release, the President stressed that the tape "will be distorted for partisan purposes and commercial gain," which he claimed amounts to an "abuse" of judicial processes.[1] (App. 53a.) These concerns were reiterated before the Court of Appeals (*see* App. 60a n.15; and 63a n.4), and were the sole possible evidentiary basis of that court's conclusion that the District Court was properly concerned with potential misuse of the videotape.

Although the necessary factual predicate for the President's legal position must be based on the record developed in the courts below, *see FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 235 (1990), Mr. Clinton, in his opposition to Citizens United's certiorari petition, chooses to ignore the record below. Instead, without citation to a single fact in the record or elsewhere, he argues that the decisions below were predicated upon legitimate, but unidentified, general concerns over potential misuse of the videotape.

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[1] The President's claim herein is similar to the one that he recently made when he sought protection from civil law suits while occupying the Oval Office lest he be subjected to "a large volume of politically motivated harassing and frivolous litigation." This Court rejected that claim of presidential prerogative, ruling that there were adequate judicial safeguards against the misuse of the judicial process. *Clinton* v. *Jones*, 520 U.S. ___, 137 L. Ed. 2d 945, 969-70 (1997). While judges may properly police such misuse inside the courtroom, it is not within judicial power to police the First Amendment marketplace of ideas outside, especially when a ruling is designed, as here, to protect the reputation of a government official. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837-42 (1978). As James Madison put it: "If we advert to the nature of a republican Government, we shall find that the censorial power is in the people over the Government, not in the Government over the people." 4 *Annals of Congress* 934 (1794).

This Court should not be misled by the President's avoidance of the true and sole factual predicate for the decisions below. In both the District Court and the Court of Appeals, Mr. Clinton vigorously opposed release of the videotape on the grounds that its potential for use by his political adversaries in "attack ads" (App. 63a) was a valid, if not compelling, reason for keeping the tape under permanent seal. As Citizens United explained in its petition for writ of certiorari, such a basis for denying access cannot be reconciled with either the First Amendment or the public's common law right of access to judicial records, and should not be allowed to stand as precedent.

CONCLUSION

For the reasons stated herein, and in Citizens United's petition, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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